

# The Criminal Sexual Conduct Act

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\*This Benchbook uses the title “Criminal Sexual Conduct Act,” despite no such official Legislative designation. At least 35 published Michigan appellate opinions make reference to the “Criminal Sexual Conduct Act.”

This chapter discusses the Criminal Sexual Conduct Act (“CSC Act”),\* MCL 750.520a et seq.—its terms and definitions, its criminal offenses, and its procedural rules and provisions.

**Note:** Pending Senate Bill 1127 would amend the CSC Act (MCL 750.520a, 750.520b, 750.520c, 750.520d, and 750.520e) to prohibit teachers, administrators, and other employees of public and non-public schools from engaging in sexual penetration or contact of its students.

This chapter is divided into seven sections. The first section discusses the background and architecture of the CSC Act. The second, third, and fourth sections discuss the Act’s “penetration,” “contact,” and “assault” offenses, and include separate subsections, when appropriate, for statutory authority, elements, penalties, sex offender registration, and pertinent case law. The fifth section discusses the terms and definitions used in the Act, and includes pertinent case law. (These terms and definitions are cross-referenced to the applicable CSC offenses contained in Sections 2.2-2.4.) The sixth section discusses lesser-included offenses under the CSC Act. The seventh and final section contains charts to assist the reader in understanding CSC offenses.

For defenses applicable to the CSC offenses, see Chapter 4.

## 2.1 Background and Architecture of the Criminal Sexual Conduct Act

\*See Note, *Michigan’s Criminal Sexual Assault Law*, 8 U of M J of L Reform 217 (1974).

The CSC Act was enacted by the Michigan Legislature through 1974 PA 266, taking effect on April 1, 1975. At the time of its enactment, the Act significantly changed the approach to sexual violence crimes in Michigan. The Michigan Supreme Court even called the Act a “radical restructuring of the rape laws.” *People v Robideau*, 419 Mich 458, 489 (1984). This radical restructuring began, in large part, because of perceived deficiencies in Michigan’s then-existing rape and statutory rape crimes, MCL 750.520. According to many sexual assault experts, Michigan’s rape and statutory rape statute contained significant inadequacies: it protected only female victims, it protected (by not criminalizing) spousal rape, and it required proof of victim resistance and victim corroboration.\* The Legislature, by enacting the CSC Act (and through later amendments), remedied those inadequacies. It made the CSC Act gender-neutral, protecting a “person” instead of a “female.” See MCL 750.520a-750.520e. It also abolished the requirements to prove victim resistance and victim corroboration, MCL 750.520i (on victim resistance) and MCL 750.520h (on victim corroboration). And, finally, through an amendment, 1988 PA 138, effective June 1, 1988, it criminalized spousal rape, MCL 750.520l. For background information on the CSC Act, see Boyle, *The Criminal Sexual Conduct Act*, 43 Det Lawyer 6 (1975); Note, *Criminal Law—Sexual Offenses—A Critical Analysis of Michigan’s Criminal Sexual Conduct Act*, 23 Wayne L Rev 203 (1976); and Note, *Michigan’s Criminal Sexual Assault Law*, 8 U of M J of L Reform 217 (1974).

The purpose of the CSC Act is “to codify, consolidate, define, and prescribe punishment for a number of sexually assaultive crimes under one heading.” *People v Cash*, 419 Mich 230, 234 n 1 (1984). The Act contains six substantive criminal offenses, as well as procedural and evidentiary laws. Regarding the six offenses, there are four “degrees” of criminal sexual conduct and two types of assault with intent to commit criminal sexual conduct:

- F **CSC—First Degree (“CSC I”)**, MCL 750.520b, life offense felony.
- F **CSC—Second Degree (“CSC II”)**, MCL 750.520c, 15-year felony.
- F **CSC—Third Degree (“CSC III”)**, MCL 750.520d, 15-year felony.
- F **CSC—Fourth Degree (“CSC IV”)**, MCL 750.520e, two-year/\$500.00 misdemeanor.
- F **Assault with Intent to Commit CSC Involving Penetration**, MCL 750.520g(1), ten-year felony.
- F **Assault with Intent to Commit CSC—Second Degree**, MCL 750.520g(2), five-year felony.

The “degrees” differentiate the elements of the various CSC crimes according to the presence or absence of certain statutory “circumstances.” The degrees do not refer to a sentence enhancement scheme based upon prior convictions. CSC offenders who have previous convictions may be subject to sentence enhancements under the CSC Act itself, MCL 750.520f (second or subsequent offenses), or under the “habitual offender” provisions in the Code of Criminal Procedure, MCL 769.10 et seq. (subsequent felony of person convicted of prior felonies). For information on the CSC Act’s enhancements, see Section 9.5(C). For information on the habitual offender provisions, see Section 9.5(D).

Procedurally, the CSC Act contains rules and provisions governing the following:

- F **Sentence enhancements for subsequent offenders**, MCL 750.520f. (Establishes a mandatory minimum sentence of five years imprisonment when a defendant’s current conviction is CSC I, CSC II, or CSC III, and the prior conviction is any of the following: CSC I, CSC II, or CSC III under the Michigan Penal Code or any similar statute from another jurisdiction [federal or state] for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, and attempts to commit such offenses. For further information, see Section 9.5(C))
- F **DNA identification profiling, chemical testing, and blood and saliva samples**, MCL 750.520m.\* (A person convicted of any felony or attempted felony or specified misdemeanor [including similar-in-kind local ordinances], must provide a blood, saliva, or tissue sample for chemical testing for DNA identification profiling [or a determination of the sample’s genetic markers and secretor status]. This provision works in conjunction with other statutory provisions covering juveniles, public wards, and prisoners. For further

\*2001 PA 89 amended MCL 750.520m, effective January 1, 2002, and expanded the scope of offenses for which a DNA sample is required.

information regarding MCL 750.520m and these other statutes, see Section 11.4 on DNA identification profiling.)

- F **Admissibility of a victim's past sexual conduct**, MCL 750.520j. (Evidence of a victim's sexual conduct is generally inadmissible in all CSC prosecutions, unless (1) the evidence is material to a fact at issue; (2) the inflammatory or prejudicial nature of the evidence does not outweigh its probative value; and (3) the evidence involves either the victim's past sexual conduct with the actor or specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. The admissibility of evidence of past sexual conduct is also governed by MRE 404(a)(3). For further information, see Section 7.2.)
- F **Suppression of a victim's name and of details of the alleged offense**, MCL 750.520k. (In all criminal sexual conduct prosecutions, if the victim, defendant, or counsel asks for it, the name of the victim, the name of the actor, and the details of the alleged offense must be suppressed by the magistrate until the defendant is arraigned on the information, the charge dismissed, or the case otherwise concluded—whichever occurs first. For further information, see Section 6.11.)
- F **Victim resistance**, MCL 750.520i. (A victim need not resist the actor in any CSC prosecution. For further information, see Section 7.10.)
- F **Corroboration of victim testimony**, MCL 750.520h. (A victim's testimony need not be corroborated in any CSC prosecution. For further information, see Section 7.9.)
- F **Abolition of spousal immunity**, MCL 750.520l. (A person may be convicted of any CSC crime, even though the victim is the person's legal spouse. But a person may not be charged and convicted solely because the person's legal spouse is under the age of 16, mentally incapable, or mentally incapacitated. For further information, see Section 4.7(B)(2)).

### **REPEALED STATUTES:**

The Legislature, effective April 1, 1975, repealed the following criminal offenses\* through 1974 PA 266:

- F Rape (and statutory rape), MCL 750.520.
- F Incest, MCL 750.333.
- F Indecent liberties with a child under 16, MCL 750.336.
- F Assault with intent to commit rape (or sodomy or gross indecency), MCL 750.85.
- F Females debauching males under 15, MCL 750.339.
- F Males debauching males under 15, MCL 750.340.
- F Ravishment of a female patient in an institution for the insane, MCL 750.341.
- F Rape of a female ward by guardian, MCL 750.342.

\*See *People v Johnson*, 406 Mich 320, 327 n 1 (1979); and Boyle, *The Criminal Sexual Conduct Act*, 43 Det Lawyer 6 (1975).

The architecture of the CSC Act is set up to analyze two components of sexual assaults: the nature of the sexual act itself and the accompanying “circumstances.”

## A. Nature of the Sexual Act

The CSC Act distinguishes between assaults that affect or are intended to affect body cavities and those that affect or are intended to affect body surfaces. *People v Bristol*, 115 Mich App 236, 238 (1981). Those sexual acts affecting body cavities are known as “penetration” offenses, and those acts affecting body surfaces are known as “contact” offenses.

“Sexual penetration”\* is defined under MCL 750.520a(m) as follows:

“‘Sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.”

“Sexual contact”\* is defined under MCL 750.520a(l) as follows:

“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

- “(i) revenge.
- “(ii) to inflict humiliation.
- “(iii) out of anger.”

The “penetration” offenses are:

- F CSC I
- F CSC III
- F Assault with Intent to Commit CSC Involving Penetration

The “contact” offenses are:

- F CSC II
- F CSC IV
- F Assault with Intent to Commit CSC II (Contact)

\*For more information on “sexual penetration,” see Section 2.5(W).

\*This definition was amended through 2000 PA 505, effective March 28, 2001. For more information on “sexual contact,” see Section 2.5(V).

\*To assist the reader in understanding CSC offenses, a CSC Chart is located in Section 2.7.

## B. "Circumstances"

Listed in each of the four degrees of CSC offenses are various "circumstances." See MCL 750.520b-750.520e. To be charged with or convicted of CSC I, CSC II, CSC III, or CSC IV, a sexual penetration or contact must be accompanied by at least one statutory "circumstance."\*

*CSC I* and *CSC II* contain the following statutory "circumstances":

- F Victim under **13 years of age**.
- F Victim at least **13 but less than 16 years of age**, AND any of the following:
  - Perpetrator is a **member of the same household** as victim;
  - Perpetrator is **related to victim by blood OR affinity to the fourth degree**; OR,
  - Perpetrator is in a **position of authority** over the victim, AND used this authority to coerce the victim to submit.
- F Sexual act involves **commission of any other felony**.
- F Perpetrator **aided or abetted by one OR more other persons**, AND either of the following:
  - Perpetrator knows OR has reason to know that the victim is **mentally incapable, mentally incapacitated, OR physically helpless**; OR
  - Perpetrator uses **force OR coercion**.
- F Perpetrator **armed with a weapon** OR an article fashioned so as to lead a person to reasonably believe it is a weapon.
- F Perpetrator uses **force or coercion** AND causes **personal injury**.
- F Perpetrator causes **personal injury** AND knows OR has reason to know the victim is **mentally incapable, mentally incapacitated, OR physically helpless**.
- F Victim is **mentally incapable, mentally disabled, mentally incapacitated, OR physically helpless**, AND one of the following:
  - Perpetrator is **related to the victim by blood OR affinity to the fourth degree**; OR,
  - Perpetrator is in a **position of authority** over the victim AND used this authority to coerce the victim to submit.
- F Perpetrator is an **employee, contractual employee, OR volunteer with, the Department of Corrections** AND knows that the victim is under its jurisdiction. (*CSC II only*).
- F Perpetrator is an **employee, contractual employee, OR volunteer with a private vendor** that operates a youth correctional facility AND knows that the victim is under the **jurisdiction of the Department of Corrections**. (*CSC II only*).

- F Perpetrator is an **employee, contractual employee, OR volunteer with a county or the Department of Corrections** AND knows that the victim is prisoner OR probationer under the **jurisdiction of the county**. (*CSC II only*).
- F Perpetrator is an **employee, contractual employee, OR volunteer with the facility** in which the victim is detained awaiting trial OR hearing OR in which the victim is committed as a result of having been found responsible for committing an act that would be a crime if committed by an adult. (*CSC II only*).

*CSC III* and *CSC IV* contain the following statutory “circumstances”:

- F Victim is at least **13 but less than 16 years of age** (*CSC III only*).
- F Victim is at least **13 but less than 16 years of age** AND the **perpetrator is five OR more years older** than the victim. (*CSC IV only*).
- F Perpetrator uses **force OR coercion**.
- F Perpetrator knows OR has reason to know the victim is **mentally incapable, mentally incapacitated, OR physically helpless**.
- F Perpetrator is **related to the victim by blood OR affinity to the third degree** AND sexual penetration OR contact occurs **under circumstances not otherwise prohibited** by the CSC Act.
- F Perpetrator is a **mental health professional** AND sexual contact occurs **during OR within two years** after victim was patient OR **client** of perpetrator AND victim was not the perpetrator’s spouse. (*CSC IV only*).

Most of the relevant terms in the CSC Act’s “circumstances,” which are bolded above, are defined in the Act’s definitional section, MCL 750.520a.\* However, one phrase, “force or coercion,” is defined within two of the Act’s criminal offenses: MCL 750.520b(1)(f) (CSC I), which provides the definition of “force or coercion” for purposes of CSC I, CSC II, and CSC III, and MCL 750.520e(1)(b) (CSC IV), which provides a separate definition of “force or coercion” for purposes of CSC IV.

\*A detailed discussion of terms used in the CSC Act appears at Section 2.5.

### C. “Aggravating Circumstances,” “Aggravating Factors,” and the “Elevation” Process

Michigan courts commonly refer to the Act’s “circumstances” as “aggravating circumstances” or “aggravating factors.” These phrases are typically used in one of two ways. One way is to refer to them as an “elevation” process:\* A sexual penetration or contact may be elevated from CSC III to CSC I, and from CSC IV to CSC II, respectively, when the penetration or contact involves one or more “aggravating circumstances” in CSC I or CSC II. A specific example of this usage is the “force or coercion” and “personal injury” elements: when the “aggravating circumstance” of “personal injury” exists with “force or coercion,” a sexual penetration or

See *People v Petrella*, 424 Mich 221, 238-239 (1986); and *People v Rogers*, 142 Mich App 88, 91 (1985).

contact may be lawfully charged as CSC I or CSC II, respectively, whereas a sexual penetration or contact with “force or coercion” alone may only be lawfully charged as CSC III or CSC IV, respectively.

Another way courts use these phrases is to refer to the elements in *all* CSC offenses as “aggravating circumstances” or “aggravating factors.” In this usage, courts are not referring to the “elevation” process or distinctions in “degree” between the CSC Act’s “penetration” or “contact” offenses. Instead, they are referring to each element as the criminalization or “aggravation” of otherwise lawful sexual penetration or contact. Because the terms “aggravating circumstances” and “aggravating factors” can be used in more than one way, it is essential to clarify the intended usage.

**Note:** When referring to the CSC Act’s elements, this Benchbook will only use the term “circumstances,” as opposed to “aggravating circumstances” or “aggravating factors”—except when directly quoting case opinions or jury instructions that use those specific terms. For examples of appellate opinions using “aggravating circumstances,” see *People v Crippen*, 242 Mich App 278, 282 (2000); *People v Goold*, 241 Mich App 333, 341 (2000); and *People v Petrella*, 424 Mich 221, 239 (1986). For opinions using “aggravating factors,” see *People v Grove*, 455 Mich 439, 448 (1997); *People v Lemons*, 454 Mich 234, 237 (1997); and *People v Dowdy*, 148 Mich App 517, 521 (1986).

## 2.2 “Penetration” Offenses

“Sexual penetration”\* is defined under MCL 750.520a(m) as follows:

“‘Sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.”

### A. Criminal Sexual Conduct—First Degree

CSC I is not only the most serious penetration offense, it is also the most serious CSC offense. It involves sexual penetration coupled with any one of the “circumstances” described in the statute, MCL 750.520b. For a discussion of terms used in the statute, see Section 2.5.

#### 1. Statutory Authority

MCL 750.520b (CSC I—Penetration) provides:

“(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

“(a) That other person is under 13 years of age.

“(b) That other person is at least 13 but less than 16 years of age and any of the following:

\*For more information about the definition of “sexual penetration,” see Section 2.5(W).



“(i) The actor is a member of the same household as the victim.

“(ii) The actor is related to the victim by blood or affinity to the fourth degree.

“(iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

“(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

“(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

“(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f)(i) to (v).

“(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

“(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

“(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

“(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

“(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.

“(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

“(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

“(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

“(i) The actor is related to the victim by blood or affinity to the fourth degree.

“(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

“(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.”

## 2. Elements of Offense

The elements of MCL 750.520b (CSC I—Penetration) are listed in CJI2d 20.1 and CJI2d 20.3-20.11 and paraphrased below as follows:

\*See Section 2.5(W).

1) First, that the defendant engaged in **sexual penetration**\* with the victim; and,

\*See Section 2.5(B) and CJI2d 20.3.

2) Second, that one of the following statutory circumstances exists:

\*See Section 2.5(B) and CJI2d 20.4.

a) The victim was **under 13 years of age**\* at the time of the sexual penetration;

\*See Section 2.5(K).

b) The victim was **at least 13 but less than 16 years of age**\* at the time of the sexual penetration, and any of the following:

\*See Section 2.5(E).

(i) the defendant was a **member of the same household**\* as the victim;

\*See Section 2.5(T).

(ii) the defendant was related to the victim **by blood or affinity**\* to the fourth degree; or

\*See Section 2.5(G) and CJI2d 20.5.

(iii) the defendant was in a **position of authority**\* over the victim and used this authority to coerce the victim to submit.

\*See Section 2.5(C).

c) The sexual penetration occurred under circumstances that also involved the **commission of any other felony**\*;

\*See Sections 2.5(O), 2.5(P), 2.5(S), and CJI2d 20.6.

d) The defendant was **aided or abetted by 1 or more other persons**\* and any of the following:

\*See Section 2.5(I) and CJI2d 20.7, 20.15.

(i) The defendant knew or should have known the victim was **mentally incapable, mentally incapacitated, or physically helpless**\*; or

\*See Section 2.5(D) and CJI2d 20.8.

(ii) the defendant used **force or coercion**\* to accomplish the sexual penetration and was assisted by another person, who either did something or gave encouragement to assist the commission of the crime;

\*Id.

e) The defendant was **armed**\* at the time with any of the following:

\*Id.

(i) a **weapon**\*;

\*Id.

(ii) an **object**\* capable of causing physical injury that the defendant used as a weapon; or

(iii) an object used or **fashioned in a manner**\* to lead the victim to reasonably believe that it was a weapon.

- f) The defendant caused **personal injury** to the victim and **force or coercion** was used to accomplish sexual penetration;\*
- g) The defendant caused **personal injury** to the victim and the defendant knew or should have known the victim was **mentally incapable, mentally incapacitated, or physically helpless** at the time of the sexual penetration;\*
- h) The victim was **mentally incapable, mentally incapacitated, or physically helpless** at the time of the sexual penetration, and any of the following:
  - (i) the defendant was related to the victim **by blood or affinity**\* to the fourth degree; or,
  - (ii) the defendant was in a **position of authority**\* over the victim and used this authority to coerce the victim to submit.

\*See Sections 2.5(R), 2.5(I), and CJI2d 20.9, 20.15.

\*See Sections 2.5(R), 2.5(O), 2.5(P), 2.5(S), and CJI2d 20.10.

\*See Sections 2.5(O), 2.5(P), 2.5(S), and CJI2d 20.11.

\*See Section 2.5(E).

\*See Section 2.5(T).

### 3. Intent

CSC I is a general intent crime. *People v Langworthy*, 416 Mich 630, 645 (1982). See also Sections 4.10(D) (Diminished Capacity); 4.13 (Voluntary Intoxication); and CJI2d 6.1 (General Intent—Intoxication Is Not a Defense).

### 4. Penalties

A violation of MCL 750.520b (CSC I—Penetration) is a felony punishable by imprisonment for life or for any term of years.

The phrase “for life or for any term of years” requires the imposition of a fixed sentence of life imprisonment or an indeterminate sentence in state prison; incarceration in the county jail is not authorized, even if the imprisonment imposed is one year or less. *People v Austin*, 191 Mich App 468, 469-470 (1991). The phrase “for life or for any term of years” does not establish a mandatory minimum sentence. *People v Luke*, 115 Mich App 223 (1982) aff’d 417 Mich 430 (1983).

CSC I is a nonprobationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, “designation,” and “waiver” proceedings, see Miller, *Juvenile Justice Benchbook* (1998), Chapters 16-24.

### 5. Sex Offender Registration

CSC I is a “listed offense” under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA’s registration and public notification requirements, see Section 11.2.

## B. Criminal Sexual Conduct—Third Degree

CSC III involves sexual penetration coupled with any one of the “circumstances” described in the statute, MCL 750.520d. For a discussion of terms used in the statute, see Section 2.5.

### 1. Statutory Authority

MCL 750.520d (CSC III—Penetration) provides:

“(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

“(a) That other person is at least 13 years of age and under 16 years of age.

“(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

“(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

“(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.”

### 2. Elements of Offense

The elements of MCL 750.520(d) (CSC III—Penetration) are listed in CJI2d 20.12 and CJI2d 20.14-20.16 and paraphrased below as follows:

- 1) First, that the defendant engaged in **sexual penetration**\* with the victim; and,
- 2) Second, that one of the following statutory circumstances exists:
  - a) The victim was **at least 13 but under 16 years of age**\* at the time of the sexual penetration;
  - b) The defendant used **force or coercion**\* to commit the sexual penetration;

\*See Section 2.5(W).

\*See Section 2.5(B) and CJI2d 20.14.

\*See Section 2.5(I) and CJI2d 20.15.

- c) The defendant knew or should have known the victim was **mentally incapable, mentally incapacitated, or physically helpless**\* at the time of the sexual penetration; or,
- d) The victim was related to the defendant by **blood or affinity**\* to the third degree and the sexual penetration occurred under circumstances not otherwise prohibited by the criminal sexual conduct statutes.

\*See Sections 2.5(O), 2.5(P), 2.5(S), and CJI2d 20.16.

\*See Section 2.5(E).

**Note:** MCL 750.520d(1)(d) states, in part, “It is an affirmative defense . . . that the [the person penetrated] was in a **position of authority** over the defendant and used this authority to coerce the defendant to violate this subsection. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged offense.”\*

\*See Section 2.5(T).

### 3. Intent

CSC III is a general intent crime. *People v Corbiere*, 220 Mich App 260, 266 (1996). See also Sections 4.10(D) (Diminished Capacity); 4.13 (Voluntary Intoxication); and CJI2d 6.1 (General Intent—Intoxication Is Not a Defense).

### 4. Penalties

A violation of MCL 750.520d (CSC III—Penetration) is a felony punishable by imprisonment for not more than 15 years.

Under case law, a prison sentence must be imposed upon conviction for CSC III. *People v Frank*, 155 Mich App 789 (1986). However, under the statutory scheme of the sentencing guidelines, a defendant convicted of CSC III with a date of offense on or after January 1, 1999 may be sentenced to a jail term if the offense falls in an Intermediate Sanction Cell. MCL 769.31(b); and MCL 769.34(4)(d).

CSC III is a nonprobationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, “designation,” and “waiver” proceedings, see Miller, *Juvenile Justice Benchbook* (1998), Chapters 16-24.

### 5. Sex Offender Registration

CSC III is a “listed offense” under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA’s registration and public notification requirements, see Section 11.2.

### 6. Pertinent Case Law—Alternative Charges

A person can be convicted of incest under CSC III (affinity) only if the sexual penetration “occurs under circumstances not otherwise prohibited by this chapter.” MCL 750.520d(1)(d). According to *People v Goold*, 241 Mich App

333 (2000), this means that a person cannot be *convicted* of both CSC III (affinity) and CSC III (force or coercion) involving the same victim, although a prosecutor may charge these offenses *alternatively* in a single count.

In *Goold*, the defendant was charged with two counts of CSC I (force or coercion) and one count of CSC III (force or coercion) for repeatedly raping his 21-year-old stepdaughter. The defendant was bound over on these offenses and on an additional count of CSC III (affinity), which was requested by the prosecutor and granted by the court at the preliminary exam. In an interlocutory appeal after the circuit court denied a motion to quash, defendant argued that the CSC III (affinity) count could not be added because testimony at the preliminary examination showed that the sexual penetration occurred under circumstances supporting the other counts of CSC I and CSC III, which would be circumstances “otherwise prohibited” under the CSC chapter. The Court of Appeals agreed with defendant’s interpretation of the “otherwise prohibited” language and reversed the circuit court’s decision denying the motion to quash. In doing so, however, the Court of Appeals drew a distinction between a prosecutor’s charging discretion and what the defendant could be convicted of at trial. The Court drew a further distinction between charging an additional count and amending a preexisting count. The Court disapproved of *adding* an additional count, but approved of the *amendment of a preexisting count* to include the charge as an *alternative theory*:

“In the present case, the district court erred in allowing the prosecutor to add CSC III aggravated by affinity as a separate charge to the criminal complaint rather than merely amending the preexisting CSC III charge to include affinity as an alternative theory to force or coercion.” *Goold, supra* at 343.

On remand, the Court of Appeals allowed the prosecutor to amend the criminal information under MCR 6.112(G) to include alternative theories of force or coercion. *Goold, supra* at 343, n 5. The Court ended its opinion by discussing whether the defendant, if charged, could be convicted of both alternative theories:

“Should this case eventually go to trial, we emphasize that *Goold* cannot, under the plain language of [the CSC III affinity statute], be convicted of the CSC III affinity charge if he is convicted of any of the other CSC charges. If a jury sits as factfinder in a trial in this case, the instructions to the jury should make this clear.” *Id.*

## 2.3 “Contact” Offenses

“Sexual contact”<sup>\*</sup> is defined under MCL 750.520a(1) as follows:

“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

“(i) Revenge.

“(ii) To inflict humiliation.

“(iii) Out of anger.”

<sup>\*</sup>For more information on sexual contact, sexual purpose, and intimate parts, see Sections 2.5(V), 2.5(U), and 2.5(J), respectively.

### A. Criminal Sexual Conduct—Second Degree

CSC II is the most serious of the “contact” offenses. It involves sexual contact coupled with any of the “circumstances” described in the statute. MCL 750.520c(1). For a discussion of terms used in the statute, see Section 2.5.

#### 1. Statutory Authority

MCL 750.520c (CSC II—Contact) provides:

“(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

“(a) That other person is under 13 years of age.

“(b) That other person is at least 13 but less than 16 years of age and any of the following:

“(i) The actor is a member of the same household as the victim.

“(ii) The actor is related by blood or affinity to the fourth degree to the victim.

“(iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

“(c) Sexual contact occurs under circumstances involving the commission of any other felony.

“(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

“(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in sections 520b(1)(f)(i) to (v).

“(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

“(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual contact. Force or coercion includes, but is not limited to, any of the circumstances listed in section 520b(1)(f)(i) to (v).

“(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

“(i) The actor is related to the victim by blood or affinity to the fourth degree.

“(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

“(i) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, the department of corrections who knows that the other person is under the jurisdiction of the department of corrections.

“(j) That other person is under the jurisdiction of the department of corrections and the actor is an employee or a contractual employee of, or a volunteer with, a private vendor that operates a youth correctional facility under section 20g of 1953 PA 232, MCL 791.220g, who knows that the other person is under the jurisdiction of the department of corrections.

“(k) That other person is a prisoner or probationer under the jurisdiction of a county for purposes of imprisonment or a work program or other probationary program and the actor is an employee or a contractual employee of or a volunteer with the county or the department of corrections who knows that the other person is under the county’s jurisdiction.

“(l) The actor knows or has reason to know that a court has detained the victim in a facility while the victim is awaiting a trial or hearing, or committed the victim to a facility as a result of the victim having been found responsible for committing an act that would be a crime if committed by an adult, and the actor is an employee or contractual employee of, or a volunteer with, the facility in which the victim is detained or to which the victim was committed.

“(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.”

## 2. Elements of Offense

The elements of MCL 750.520c (CSC II—Contact) are listed in CJI2d 20.2-20.11 and paraphrased below as follows:

- 1) First, that the defendant engaged in **sexual contact**\* with the victim;
- 2) Second, that the sexual contact can reasonably be construed as being for the purpose of **sexual arousal or gratification**,\* done for a sexual purpose, or in a sexual manner for revenge, to inflict humiliation, or out of anger; and,
- 3) Third, that one of the following statutory circumstances exists:

\*See Section 2.5(V).

\*See Section 2.5(U).



- |   |  |
|---|--|
| a) The victim was <b>under 13 years of age*</b> at the time of the sexual contact;  | *See Section 2.5(B) and CJI2d 20.3.                            |
| b) The victim was <b>at least 13 but less than 16 years of age*</b> at the time of the sexual contact, and any of the following:  | *See Section 2.5(B) and CJI2d 20.4.                            |
| (i) the defendant was a <b>member of the same household*</b> as the victim;   | *See Section 2.5(K).   |
| (ii) the defendant was related to the victim by <b>blood or affinity*</b> to the fourth degree; or  | *See Section 2.5(E).   |
| (iii) the defendant was in a <b>position of authority*</b> over the victim and used this authority to coerce the victim to submit.  | *See Section 2.5(T).   |
| c) The sexual contact occurred under circumstances that also involved the <b>commission of a felony*</b> ;  | *See Section 2.5(G) and CJI2d 20.5.                            |
| d) The defendant was <b>aided or abetted by 1 or more other persons*</b> and any of the following:  | *See Section 2.5(C).   |
| (i) The defendant knew or should have known the victim was <b>mentally incapable, mentally incapacitated, or physically helpless*</b> ; or  | *See Sections 2.5(O), 2.5(P), 2.5(S), and CJI2d 20.6.          |
| (ii) the defendant used <b>force or coercion*</b> to accomplish the sexual contact, and was assisted by another person, who either did something or gave encouragement to assist the commission of the crime;                         | *See Section 2.5(I) and CJI2d 20.7, 20.15.                     |
| e) The defendant was <b>armed*</b> at the time with any of the following:   | *See Section 2.5(D) and CJI2d 20.8.                            |
| (i) a <b>weapon*</b> ;  | *Id.   |
| (ii) an <b>object*</b> capable of causing physical injury that the defendant used as a weapon; or   | *Id.   |
| (iii) an object used or <b>fashioned in a manner*</b> to lead the victim to reasonably believe that it was a weapon.  | *Id.   |
| f) The defendant caused <b>personal injury</b> to the victim and <b>force or coercion</b> was used to accomplish sexual contact;*   | * See Sections 2.5(R), 2.5(I), and CJI2d 20.9, 20.15.          |
| g) The defendant caused <b>personal injury</b> to the victim and the defendant knew or should have known the victim was <b>mentally incapable, mentally incapacitated, or physically helpless</b> at the time of the sexual contact;* | *See Sections 2.5(R), 2.5(O), 2.5(P), 2.5(S), and CJI2d 20.10. |

\*See Sections 2.5(O), 2.5(P), 2.5(S), and CJI2d 20.11.

\*See Section 2.5(E).

\*See Section 2.5(T).

h) The victim was **mentally incapable, mentally incapacitated, or physically helpless** at the time of the sexual contact, and any of the following:\*

(i) the defendant was related to the victim by **by blood or affinity**\* to the fourth degree; or,

(ii) the defendant was in a **position of authority**\* over the victim and used this authority to coerce the victim to submit.

Effective October 1, 2000, the Michigan Legislature amended MCL 750.520c (CSC II) by adding subsections (i)-(l) that address the unlawful sexual contact of prisoners and probationers by employees or volunteers of the Department of Corrections (or counties or other facilities). See MCL 750.520c(1)(i)-(l), cited in Section 2.3(A)(1), above. As of this Benchbook’s publication date, CJI2d 20.2-20.11 have not yet been amended to reflect these added sections.

### 3. Intent

\*See Section 2.5(U).

CSC II is a general intent crime. See *People v Brewer*, 101 Mich App 194, 196 (1980) (holding that the phrase “reasonably be construed as being for the purpose of sexual arousal or gratification”\* requires general intent). See also Sections 4.10(D) (Diminished Capacity); 4.13 (Voluntary Intoxication); and CJI2d 6.1 (General Intent—Intoxication Is Not a Defense).

### 4. Penalties

A violation of MCL 750.520c (CSC II—Contact) is a felony punishable by imprisonment for not more than 15 years.

CSC II is a probationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, “designation,” and “waiver” proceedings, see Miller, *Juvenile Justice Benchbook* (1998), Chapters 16-24.

### 5. Sex Offender Registration

CSC II is a “listed offense” under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA’s registration and public notification requirements, see Section 11.2.

## B. Criminal Sexual Conduct—Fourth Degree

CSC IV involves sexual contact coupled with any one of the “circumstances” described in the statute. MCL 750.520e(1). For a discussion of terms used in the statute, see Section 2.5.

## 1. Statutory Authority

MCL 750.520e (CSC IV—Contact) provides:

“(1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:

“(a) That other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.

“(b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:

“(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

“(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.

“(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute that threat. As used in this subparagraph, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.

“(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

“(v) When the actor achieves the sexual contact through concealment or by the element of surprise.

“(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

“(d) That other person is related to the actor by blood or affinity to the third degree and the sexual contact occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

“(e) The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. This does not indicate that the victim is mentally incompetent.

“(2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than \$500.00, or both.”

## 2. Elements of Offense

The elements of MCL 750.520e (CSC IV—Contact) are listed in CJI2d 20.13 and CJI2d 20.15-20.16 and paraphrased below as follows:

\*See Section 2.5(V).

\*See Section 2.5(U).

- 1) First, that the defendant engaged in **sexual contact**\* with the victim;
- 2) Second, that the sexual contact can reasonably be construed as being for the purpose of **sexual arousal or gratification**\*, done for a sexual purpose, or in a sexual manner for revenge, to inflict humiliation, or out of anger; and,
- 3) Third, that one of the following statutory circumstances exists:
  - a) The victim was **at least 13 but less than 16 years of age**\*, and the defendant was five or more years older than the victim;
  - b) The defendant used **force or coercion**\* to commit the sexual contact;
  - c) The defendant knew or should have known the victim was **mentally incapable, mentally incapacitated, or physically helpless** at the time of the sexual contact\*;
  - d) The victim was related to the defendant by **blood or affinity**\* to the third degree and the sexual contact occurred under circumstances not otherwise prohibited by the criminal sexual conduct offenses.

\*See Section 2.5(B) and CJI2d 20.15.

\*See Section 2.5(I) and CJI2d 20.15.

\*See Sections 2.5(O), 2.5(P), 2.5(S), and CJI2d 20.11.

\*See Section 2.5(E).

\*See Section 2.5(T).

**Note:** MCL 750.520e(1)(d) states, in part, “It is an affirmative defense . . . that the [person penetrated] was in a **position of authority** over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged offense.”\*

Effective March 28, 2001, the Michigan Legislature amended MCL 750.520e (CSC IV), by adding a subsection addressing sexual contacts made by a “mental health professional” during or within two years after the period in which the victim is his or her client or patient and not his or her spouse, regardless of the victim’s consent. See MCL 750.520e(1)(e), quoted in Section 2.3(B)(1) above. As of this Benchbook’s publication date, CJI2d 20.13 and CJI2d 20.15-20.16 have not yet been amended to reflect this added section.

## 3. Intent

\*See Section 2.5(U).

CSC IV is a general intent crime. *People v Lasky*, 157 Mich App 265, 272 (1987). See also *People v Brewer*, 101 Mich App 194, 195-196 (1980) (holding that the phrase “reasonably be construed as being for the purpose of sexual arousal or gratification”\* requires general intent) and Sections 4.10(D)

(Diminished Capacity); 4.13 (Voluntary Intoxication); and CJI2d 6.1 (General Intent—Intoxication Is Not a Defense).

#### 4. Penalties

A violation of MCL 750.520e (CSC IV—Contact) is a “high court” misdemeanor punishable by imprisonment for not more than 2 years, or a maximum fine of \$500.00, or both.

CSC IV is a probationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, “designation,” and “waiver” proceedings, see Miller, *Juvenile Justice Benchbook* (1998), Chapters 16-24.

#### 5. Sex Offender Registration

CSC IV is a “listed offense” under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA’s registration and public notification requirements, see Section 11.2.

### 2.4 “Assault” Offenses

Crimes of sexual violence do not always culminate in the actual sexual penetration or touching of a victim. In some cases, the perpetrator may be thwarted from carrying out a sexual penetration or contact despite having the intent to do so. To protect victims in these circumstances, the CSC Act enacted two crimes:

- F Assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1).
- F Assault with intent to commit CSC II—contact, MCL 750.520g(2).\*

It is important to distinguish between the CSC Act’s “assault” offenses and “attempted” offenses under the general attempt statute, MCL 750.92. An “attempt” to commit criminal sexual conduct is not necessarily the same as “assault with intent to commit criminal sexual conduct.” For example, a perpetrator may commit an overt act beyond “mere preparation” but never actually “assault” the victim. In these circumstances, an “attempt” to commit CSC I-IV may be the proper charge. See Saltzman, *Michigan Criminal Law* (2d ed), §5-8(d), p 422; *People v Stapf*, 155 Mich App 491, 494 (1986); and CJI2d 9.1, 17.1. Additionally, an assault committed with the intention of accomplishing CSC IV is not a crime under the CSC “assault” offenses,\* but may be the crime of “attempted” CSC IV. For more information on the crime of “attempt,” see Section 3.6.

\*See Sections 2.5(W) “Sexual Penetration,” and 2.5(V) “Sexual Contact.”

\*It would, however, be a crime if the assault was committed with the intention of accomplishing CSC II, MCL 750.520g(2), or sexual penetration, MCL 750.520g(1).

## A. Assault With Intent to Commit Criminal Sexual Conduct Involving Penetration

### 1. Statutory Authority

MCL 750.520g(1) (Assault with Intent to Commit CSC—Penetration) provides:

“Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.”

### 2. Elements of Offense

*People v Love*, 91 Mich App 495, 502 (1979) established two elements for this offense:\*

- F The defendant committed an assault; and,
- F The defendant had the intent to commit sexual penetration.

**Note:** An “assault” is an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Johnson*, 407 Mich 196, 210 (1979). The jury should be instructed that an assault requires an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery. *Id.*

The elements of the offense are listed under CJI2d 20.17 and CJI2d 20.19-20.23 and paraphrased below as follows:

- 1) First, that the defendant either attempted to commit a battery on the victim, or did an illegal act that made the victim reasonably fear an immediate battery. A battery is a forceful or violent touching of the person or something closely connected with the person;
- 2) Second, that the defendant intended either to injure the victim or to make the victim reasonably fear an immediate battery;
- 3) Third, that at the time, the defendant had the ability, appeared to have the ability, or thought he or she had the ability to commit a battery; and
- 4) Fourth, that when the defendant assaulted the victim, the defendant intended to commit a sexual act involving criminal **sexual penetration**.<sup>\*</sup> This means that the defendant must have intended some actual entry into one person’s [genital opening/anal opening/mouth] with another person’s [penis/finger/tongue/(state object)].
- 5) It is not required that the defendant actually began to commit the sexual penetration. To prove this charge, the prosecutor must prove that the defendant made an **attempt**<sup>\*</sup> or a threat while intending to commit sexual penetration.

\*See also *People v Snell*, 118 Mich App 750, 754-755 (1982), lv den 417 Mich 1032 (1983).

\*See Section 2.5(W).

\*See Section 3.6.

- 6) An actual touching or penetration is not required. To prove this charge, the prosecutor must prove that the defendant committed the assault and intended to commit criminal sexual penetration.
- 7) [Follow this instruction with one or more of the five alternatives, CJI2d 20.19 to CJI2d 20.23, as warranted by the evidence. See the table of contents on p. 20-1 for a list of the alternatives.]

### 3. Intent

Assault with Intent to Commit CSC—Penetration is a specific intent crime. *People v Snell*, 118 Mich App 750, 754-755 (1982), lv den 417 Mich 1032 (1983); *People v Swinford*, 150 Mich App 507, 516 (1986); and *People v Love*, *supra* at 502-503. See also Sections 4.10(D) (Diminished Capacity); 4.13 (Voluntary Intoxication); and CJI2d 3.9 (Specific Intent).

To be convicted of this crime, a defendant “must have intended an act involving some sexually improper intent or purpose.” *People v Snell*, *supra* at 755. There is no need to prove that a sexual act was started or completed. *Id.* Also, there is no need to prove the actual existence of a “circumstance,” such as force or coercion, because the crime’s assault element suffices: “[W]hen coupled with the intent to commit sexual penetration, proof of the assault necessarily establishes the intent to commit the kind of criminal sexual conduct prohibited by MCL 750.520d [CSC III].” *People v Love*, *supra* at 503.

In *People v McFall*, 224 Mich App 403, 412 (1997), the Court of Appeals found the following evidence sufficient to satisfy an “intent to sexually penetrate” the victim:

“[T]he complainant testified that after defendant had touched her genitalia, he choked her and told her to take her pants all the way down. She also testified that, at one point, defendant ‘was fumbling with his hand down by his pants.’ This evidence, viewed in a light most favorable to the prosecution, is sufficient to permit a reasonable factfinder to conclude that defendant intended to sexually penetrate the complainant.”

### 4. Penalties

A violation of MCL 750.520g(1) (Assault with Intent to Commit CSC—Penetration) is a felony punishable by imprisonment for not more than 10 years.

Assault with Intent to Commit CSC—Penetration is a probationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, “designation,” and “waiver” proceedings, see Miller, *Juvenile Justice Benchbook* (1998), Chapters 16-24.

## 5. Sex Offender Registration

Assault with Intent to Commit CSC—Penetration is a “listed offense” under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA’s registration and public notification requirements, see Section 11.2.

## 6. Pertinent Case Law—Affirmative Defenses

Although the affirmative defense of consent for victims under 16 years old is legally ineffective in CSC I-IV crimes, including “attempted” CSC crimes, it is applicable to CSC “assault” offenses. *People v Worrell*, 417 Mich 617 (1983). For more information on the consent defense, see Section 4.7.

## B. Assault With Intent to Commit CSC II—Contact

### 1. Statutory Authority

MCL 750.520g(2) (Assault with Intent to Commit CSC II—Contact) provides:

“Assault with intent to commit criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 5 years.”

### 2. Elements of Offense

*People v Snell*, 118 Mich App 750, 754-755 (1982), lv den 417 Mich 1032 (1983), established the elements of MCL 750.520g(2) (Assault with Intent to Commit CSC II—Contact) as follows:

- 1) First, the defendant committed an assault;
- 2) Second, the defendant intended to do the act for the purpose of sexual arousal or sexual gratification;
- 3) Third, the defendant specifically intended to touch the victim’s genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, or defendant specifically intended to have the victim touch such an area on him or her; and,
- 4) Fourth, there must be some statutory “circumstances,” e.g., the use of force or coercion. An actual touching is not required.

**Note:** An “assault” is an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Johnson*, 407 Mich 196, 210 (1979). The jury should be instructed that an assault requires an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery. *Id.*



The elements of the offense are listed under CJI2d 20.18 and CJI2d 20.3-20.11 and paraphrased below as follows:

- 1) First, that the defendant either attempted to commit a battery on the victim, or did an illegal act that made the victim reasonably fear an immediate battery. A battery is a forceful or violent touching of the person or something closely connected with the person;
- 2) Second, that the defendant intended either to injure the victim or to make the victim reasonably fear an immediate battery;
- 3) Third, that at the time, the defendant had the ability, appeared to have the ability, or thought he or she had the ability to commit a battery;
- 4) Fourth, that when the defendant assaulted the victim, the defendant intended to commit a sexual act involving criminal **sexual contact**. This means that the defendant must have specifically intended to touch the victim's **intimate parts**, or the clothing covering those parts, or to have the victim touch his or her intimate parts;\*
- 5) Fifth, that when the defendant assaulted the victim, the defendant must have specifically intended to do the act involving criminal sexual contact for the purpose of **sexual arousal or gratification**.\*
- 6) However, an actual touching or penetration is not required.
- 7) [Instruct the jury as to one or more of the nine alternative aggravating circumstances, CJI2d 20.3 to CJI2d 20.11, as warranted by the evidence. See the table of contents on p. 20-1 for a list of the alternatives.]

\*See Sections 2.5(V) and 2.5(J), respectively.

\*See Section 2.5(U).

### 3. Intent

Assault with Intent to Commit CSC II—Contact is a specific intent crime. *People v Snell, supra* at 755. See also Sections 4.10(D) (Diminished Capacity); 4.13 (Voluntary Intoxication); and CJI2d 3.9 (Specific Intent).

A statutory “circumstance” need not actually exist to establish a violation of MCL 750.520g(2) (Assault with Intent to Commit CSC II—Contact). Instead, only an intention to do an act that would create a “circumstance” need be proven. In *People v Lasky*, 157 Mich App 265, 270-271 (1987), the Court of Appeals stated:

“[W]e do not believe that an aggravating circumstance must actually exist in every case in order to convict an accused of ‘*assault with intent to commit criminal sexual conduct in the second degree*,’ as opposed to ‘*criminal sexual conduct in the second degree*.’ Depending upon the particular aggravating circumstances involved, it may be sufficient to establish that the accused *intended* to do some act which would have given rise to an aggravating circumstance.” [Emphasis in original.]

#### 4. Penalties

A violation of MCL 750.520g(2) (Assault with Intent to Commit CSC II—Contact) is a felony punishable by imprisonment for not more than 5 years.

Assault with Intent to Commit CSC II—Contact is a probationable offense for adult offenders. MCL 771.1(1). For further information regarding probation in juvenile delinquency, “designation,” and “waiver” proceedings, see Miller, *Juvenile Justice Benchbook* (1998), Chapters 16-24.

#### 5. Sex Offender Registration

Assault with Intent to Commit CSC II—Contact is a “listed offense” under the Sex Offenders Registration Act (SORA). See MCL 28.722(d). For more information on SORA’s registration and public notification requirements, see Chapter 11.2.

#### 6. Pertinent Case Law—Affirmative Defenses

Although the affirmative defense of consent for victims under 16 years old is legally ineffective in CSC I-IV crimes, including “attempted” CSC crimes, it is applicable to CSC “assault” offenses. *People v Worrell*, 417 Mich 617 (1983). For more information on the consent defense, see Section 4.7.

### 2.5 Terms Used in the CSC Act

The terms discussed in this section exist in the CSC Act’s criminal offenses, and are relevant to the discussion of the Act throughout this Benchbook.

#### A. “Actor”

MCL 750.520a(a) defines “actor” as a “person accused of criminal sexual conduct.”

#### B. “Age”

The CSC Act criminalizes the sexual penetration or touching of minors under 16 years of age. The Act created the following age groups for minor victims:

- F Under 13 years of age. MCL 750.520b(1)(a) (CSC I—Penetration); and MCL 750.520c(1)(a) (CSC II—Contact).
- F At least 13 but less than 16 years of age. MCL 750.520b(1)(b) (CSC I—Penetration); MCL 750.520c(1)(b) (CSC II—Contact); MCL 750.520d(1)(a) (CSC III—Penetration); and MCL 750.520e(1)(a) (CSC IV—Contact).\*

\*CSC IV also requires the perpetrator to be five or more years older than the victim.

The CSC Act's age offenses are strict liability crimes.\* The reasonable-mistake-of-age defense does not apply to the CSC Act. *People v Cash*, 419 Mich 230, 246 (1984). (Although *Cash* was decided under the CSC III statute, the rationale of the opinion presumably applies to all other CSC offenses, and to both age groups. *Id.* at 234 n 1, 242.) The consent of victims under age 16 is legally ineffective under CSC I-IV. *People v Worrell*, 417 Mich 617, 623 (1983). However, the consent defense does apply to CSC "assault" offenses, regardless of the victim's age. *Id.* at 622. For more information on the mistake-of-fact defense, see Section 4.11. For more information on the consent defense, see Section 4.7.

\*See *In re Hildebrant*, 216 Mich App 384, 386 (1996).

### C. "Aided or Abetted by 1 or More Other Persons"

Sexual violence involving multiple actors\* "increases the potential danger to the victim as well as decreases the [victim's] possibility of escape." *People v Hurst*, 132 Mich App 148, 152 (1984). To deter such violence by multiple participants, CSC I and II prohibit actors from engaging in sexual penetration or contact when "aided or abetted by 1 or more other persons" in the following circumstances:

\*This subsection uses the term "actor" to signify the principal participant who is being aided and abetted by others.

- F When the actor knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(d)(i) (CSC I—Penetration); MCL 750.520b(1)(d)(i) (CSC II—Contact).
- F When the actor uses force or coercion.\* MCL 750.520b(1)(d)(ii) (CSC I—Penetration); and MCL 750.520c(1)(d)(ii) (CSC II—Contact).

\*See Sections 2.5(O), 2.5(P), and 2.5(S), respectively.

\* See Section 2.5(I).

For purposes of the foregoing provisions on aiding and abetting, "force or coercion" is defined in MCL 750.520b(f)(i) to (v). See Section 2.5(I) for general information about "force or coercion." Note that "force or coercion," as used in the aiding and abetting provisions, does not incorporate the "personal injury" requirement of MCL 750.520b(f) (CSC I—Penetration); and MCL 750.520c(f) (CSC II—Contact). *People v Rogers*, 142 Mich App 88, 91 (1985).

#### 1. Definition of "Aiding and Abetting"

The Michigan Supreme Court, in *People v Palmer*, 392 Mich 370, 378 (1974), defined "aiding and abetting" as follows:

"In criminal law the phrase 'aiding and abetting' is used to describe *all forms of assistance* rendered to the perpetrator of a crime. This term comprehends *all words or deeds which may support, encourage or incite the commission of a crime*. It includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary. . . . The amount of advice, aid or encouragement is not material if it had the effect of inducing the commission of the crime. *People v Washburn*, 285 Mich 119, 126; 280 NW 132 (1938)." [Emphasis added.]

## 2. Mere Presence Not Enough

Mere presence is not enough to make a person an aider or abetter, even if that person has knowledge of the crime being committed. See *People v Rockwell*, 188 Mich App 405, 412 (1991), quoting *People v Burrel*, 253 Mich 321 (1931); and *People v Killingsworth*, 80 Mich App 45, 50 (1977). A caveat to the “mere presence” rule is the “mutual reassurance” doctrine, enunciated in *People v Smock*, 399 Mich 282, 285 (1976). See Section 3.4(E)(5) for a discussion of this doctrine.

## 3. Actor Must Engage in Sexual Penetration or Contact

The references to “aided or abetted by 1 or more persons” in the CSC I and CSC II statutes apply only to an actor who *engages in* sexual penetration or contact and who is aided or abetted by one or more persons. *People v Hurst*, 132 Mich App 148, 153 (1984); MCL 750.520b(1); and MCL 750.520c(1). They do not apply to the common circumstance of persons who do not *engage in* sexual penetration or contact but who aid, encourage, or facilitate others to commit the sexual penetration or contact. This does not mean, however, that aiders and abettors who themselves do not “engage” in sexual penetration or contact escape criminal responsibility. Such aiders and abettors can be charged under the general aiding and abetting statute in the Code of Criminal Procedure, MCL 767.39, which can be used in conjunction with the CSC Act. *People v Pollard*, 140 Mich App 216, 220-221 (1985).

For further discussion of the general aiding and abetting statute, see Section 3.4.

## 4. General Intent Crimes

It is possible to aid and abet general intent crimes, such as CSC I-IV. *People v Turner*, 125 Mich App 8, 11-12 (1983); and *People v Pitts*, 84 Mich App 656 (1978).

## 5. Conviction for Each Penetration or Contact

A defendant charged under the CSC Act’s aiding and abetting elements may be convicted of each penetration or contact committed by the principals, as long as the defendant aided or abetted each specific penetration or contact. *People v Rogers, supra* at 92.

For further discussion of the general aiding and abetting statute, and its applicability to CSC offenses, see Section 3.4.

## D. “Armed with a Weapon”

The presence of a weapon in a sexual assault makes the assault “more reprehensible, increases the victim’s danger, and lessens the victim’s chances of escape.” *People v Proveaux*, 157 Mich App 357, 362-363 (1987). To deter

the use of weapons in sexual assaults, the CSC Act imposes harsher punishment when the perpetrator is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon. MCL 750.520b(1)(e) (CSC I—Penetration); and MCL 750.520c(1)(e) (CSC II—Contact).

This “force or coercion” element includes a “force or coercion” requirement, despite no explicit reference to “force or coercion.”\* *People v Hearn*, 100 Mich App 749, 753-755 (1980). A “force or coercion” requirement is imputed into this element because the Court of Appeals, in *Hearn*, *supra* at 753, held that the affirmative defense of consent applies to this element:

“The prosecutor argues that consent cannot be a defense to a charge of criminal sexual conduct under [CSC I—armed with a weapon], since the only elements of that offense are, first, that there be sexual penetration and, second, that the sexual penetration occur while the actor is armed. Although the explicit language of the [CSC Act] may seem to support the prosecutor’s position we find that consent remains a defense to the charged offense of sexual misconduct.”

\*This “force or coercion” requirement also applies to the “Commission of Any Other Felony” element. See Section 2.5(G).

Consent is defined as a willing, non-coerced sexual act. *People v Jansson*, 116 Mich App 674, 682 (1982); and CJI2d 20.27(1). For more information on consent, including its definition and applicability, see Section 4.7. For more information about this issue generally, see Saltzman, *Michigan Criminal Law* (2d ed), § 5-3(f), p 389-390.

The CSC Act does not define “armed” or “weapon” or “any article used or fashioned” as a weapon. However, a number of appellate opinions have defined the meaning of “possession,” “armed,” and “dangerous weapon.”

### 1. “Possession”

The term “possession” connotes dominion or right of control over an article with knowledge of its presence and character, and it encompasses both actual and constructive possession. *People v Mumford*, 60 Mich App 279, 282-283 (1975). “Constructive possession” means a person “has proximity to the article together with indicia of control.” *People v Davis*, 101 Mich App 198, 202 (1980). “Possession” may be proved by circumstantial evidence. *People v Mumford*, *supra* at 283.

### 2. “Armed”

A defendant need not actually “hold” the weapon to be deemed “armed” under the CSC Act. In *Davis*, *supra* at 201-203, the defendant raped the victim with his rifle six feet away. The Court of Appeals held that defendant was “armed” within the meaning of the CSC I statute because he had “constructive possession” of the rifle. The Court concluded that the term “armed” includes “possession,” which comprises both actual and constructive possession. The Court further held that “constructive possession” exists when one has proximity to the article together with indicia of control. The Court stated that a perpetrator need not have the weapon in hand while committing the sexual

assault, so long as the weapon is “reasonably accessible” to the perpetrator and the perpetrator “has knowledge of the weapon’s location.” *Id.*

In *People v Flanagan*, 129 Mich App 786, 797-798 (1983), the defendant forced two 13-year-old girls into his car by knifepoint where he forced them to perform multiple acts of fellatio and sexual intercourse. Throughout these events, at various times, the knife was “in defendant’s right hand while his arm was around their necks, on the seat next to him to his left, in his left hand and clenched in his teeth.” *Id.* at 790. On appeal, the defendant claimed that he was not “armed” during the acts of fellatio because the knife was not on his person. In relying on *Davis, supra*, the Court of Appeals said defendant’s claim was meritless, for the evidence “clearly established that the weapon was accessible, and, therefore, possessed by defendant.” *Flanagan, supra* at 798.

A person can be “armed” under the CSC Act even when the weapon is inaccessible and its exact location unknown. In *People v Proveaux, supra*, the Court of Appeals decided a case in which the perpetrator’s weapon was not reasonably accessible, and the perpetrator did not know its exact location. Acknowledging that the case was different from both *Davis* and *Flanagan*, the Court in *Proveaux* held that defendant was still “armed” under the CSC Act because he began the sexual assault with a weapon. In *Proveaux*, the defendant awakened the victim in her bedroom while holding a knife at her throat. The victim got up and asked to go to the bathroom, but instead went outside through the back door. With the knife at her throat, defendant pulled the victim into the house. After more struggling, the two got outside again, but the victim took the knife out of defendant’s hand and threw it toward the bushes or street. Without retrieving the knife, defendant pulled the victim into the house again and had sexual intercourse with her. On appeal, defendant claimed he could not be convicted of CSC I for being “armed with a weapon” because he was disarmed before the sexual penetration. The Court of Appeals disagreed, holding:

“We believe . . . that defendant was armed with a weapon within the statute’s meaning so as to make the crime first-degree criminal sexual conduct. . . . It is enough that defendant began the assault with a knife, putting the victim in fear and traumatizing her. The sexual penetration was part of a continuing event beginning with the armed assault. . . . A rule requiring actual or constructive possession of the weapon through the course of the sexual assault would mean that a defendant could first subdue the victim with a weapon and then discard it before actual penetration. Such a rule would mean that the victim’s actions in defending herself lessened the crime’s seriousness.” *Proveaux, supra* at 362-363.

Despite the foregoing appellate opinions, a perpetrator is not “armed” under the CSC Act if the weapon is possessed by another person acting in concert with the perpetrator. In *People v Benard*, 138 Mich App 408 (1984), the defendant and an accomplice forcibly entered the victim’s house. Upon entry, the accomplice held a gun on the victim, forced her to lie naked on the couch, and then raped her. Even though the gun was within proximity to the

defendant, and even though the defendant knew of the gun, the Court of Appeals chose to distinguish the case from both *Davis* and *Flanagan*, stating:

“Where a weapon is actually in the hands of a second party, we decline to go so far as to hold that possession is also held by a first person even though the first person is acting in concert with the second person. Realistically, defendant did not control the weapon which was in [the accomplice’s] hand. Defendant was in proximity to the weapon but [the accomplice] had control of the gun.” *Benard*, *supra* at 411.

### 3. “Weapon” or “Dangerous Weapon”

As of this Benchbook’s publication date, no published Michigan appellate opinions have construed the term “weapon” as used under the CSC Act. But one recent appellate opinion has construed the term “weapon” in the context of the Michigan sentencing guidelines offense variable 1 (aggravated use of a weapon), MCL 777.31. In *People v Lange*, \_\_\_ Mich App \_\_\_ (2002), a murder case in which the defendant repeatedly struck the victim with a glass mug, the Court of Appeals concluded that the glass mug fit within the plain and ordinary meaning of “weapon,” which is defined in the *Random House Webster’s College Dictionary* as follows:

“‘[A]ny instrument or device used for attack or defense in a fight or in combat’ and ‘anything used against an opponent, adversary or victim.’” *Lange*, *supra* at \_\_\_.

Additionally, Michigan appellate opinions have also construed the term “dangerous weapon” as used in other assault statutes, such as the armed robbery statute, MCL 750.529, and the felonious assault statute, MCL 750.82. Although these statutes use the term “dangerous weapon” instead of the CSC Act’s “weapon,” they can be analogized to the CSC Act based upon the established definition of “dangerous weapon” set forth below. See *Lange*, *supra* at \_\_\_ (“The Legislature’s silence when using terms previously interpreted by the courts suggests agreement with the court’s construction.”) Moreover, the armed robbery statute’s language concerning the use of any other “article” is nearly identical to the CSC Act’s language. In fact, the Michigan Supreme Court in *People v Parker*, 417 Mich 556, 566 (1983), a case involving armed robbery and CSC I (armed with a weapon), wrote the following: “What we have said about the armed element in the robbery statute has equal application to the first-degree criminal sexual conduct charge as brought herein.”

CSC I and II state in pertinent part:

“(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.” MCL 750.520b(1)(e) (CSC I—Penetration); and MCL 750.520c(1)(e) (CSC II—Contact).

The armed robbery statute states, in pertinent part:

“Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being *armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon*, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.” MCL 750.529. [Emphasis added.]

The felonious assault statute states, in pertinent part:

“Except as provided in subsection (2) [governing weapon-free school zones] a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or *other dangerous weapon* without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than \$2,000.00, or both.” MCL 750.82. [Emphasis added.]

A “dangerous weapon” is defined as either:

- (1) a weapon designed to be dangerous and, when employed, is per se deadly (i.e., capable of causing death or serious injury); or,
- (2) an instrumentality which, although not designed to be a dangerous weapon, is used as a weapon and, when employed, is dangerous (i.e., capable of causing death or serious injury).<sup>\*</sup> *People v Norris*, 236 Mich App 411, 415 (1999); *People v Barkley*, 151 Mich App 234, 238 (1986); and CJI2d 18.1(3), Armed Robbery. For a definition of “serious injury,” see MCL 750.81a (aggravated assault); and CJI2d 17.6(4), cited in *Norris, supra* at 415, n 3.

In applying the definition of “dangerous weapon” above, the Court of Appeals, in *Barkley, supra* at 238, gave an example of a weapon that would qualify under each of the subparagraphs: a “loaded gun” would satisfy the first subparagraph, and a “screwdriver used as a knife” would satisfy the second subparagraph.

It is important to note that a person can still be deemed “armed” under the armed robbery statute (and hence the CSC I and CSC II statutes) even when the person is not possessing a “dangerous weapon” as defined above. For example, the court in *Barkley, supra*, noted that a toy gun would not be a “dangerous weapon” under either subparagraph of the “dangerous weapon” definition, but it could satisfy the second portion of the “being armed” element of the armed robbery statute, which requires that a defendant be armed with an “object fashioned or used in a manner which leads the victim to reasonably believe that the object is a dangerous weapon.” *Id.* at 238 n 2.

<sup>\*</sup>See also *Lange, supra* at \_\_\_, which used a similar definition of “dangerous weapon” from *People v Vaines*, 310 Mich 500, 505-506 (1945), when construing the phrase “any other type of weapon” as used in sentencing guidelines offense variable 1, MCL 777.31.



The following cases give examples of objects that have been held to be “dangerous weapon[s]” or “article[s] used or fashioned” as weapons, under the armed robbery statute:

- F *People v Taylor*, 245 Mich App 293, 301 (2001) (A bulge in defendant’s jacket, along with placing his hand in open jacket and down front of pants and saying, “This is a stick up!”).
- F *People v Norris*, 236 Mich App 411, 418-419 (1999) (Chemical device containing tear gas mixture was dangerous weapon).
- F *People v Jolly*, 442 Mich 458 (1993) (A bulge in the defendant’s vest, along with an accomplice’s threat that defendant would shoot the victim, are circumstantial evidence that defendant was armed with a weapon or article fashioned to look like a weapon).
- F *People v Grihm*, 148 Mich App 285, 289 (1986) (hand in pocket fashioned like gun).
- F *People v Kimble*, 109 Mich App 659, 665 (1981), modified on other grounds 412 Mich 890 (1981) (paper bag fashioned like gun).
- F *People v Schofield*, 124 Mich App 134, 135 (1983), rev’d on other grounds 417 Mich 988 (1983) (toy gun).
- F *People v Gibson*, 94 Mich App 172, 177 (1979), rev’d on other grounds 411 Mich 993 (1981) (not necessary to prove gun operability).
- F *People v Williams*, 1 Mich App 441, 444 (1965) (bottle).
- F *People v Velasquez*, 189 Mich App 14 (1991) (automobile).
- F *People v Parker*, 417 Mich 556, 565 (1983) (Words or threats alone can never be “dangerous weapons,” but words or threats may be evidence of the fact of being “armed”).

The following cases give examples of objects that have been held to be “dangerous weapon[s]” under the felonious assault statute:

- F *People v Bender*, 124 Mich App 571, 575-576 (1983) (aerosol spray can containing Chlorobenzalmalonitrile).
- F *People v Morgan*, 50 Mich App 288, 292-293 (1973), rev’d on other grounds 400 Mich 527 (1977) (lighter fluid).
- F *People v Kay*, 121 Mich App 438 (1982) (dog).
- F *People v Rivera*, 120 Mich App 50, 55-56 (1982) (bottle of wine).
- F *People v Ragland*, 14 Mich App 425, 426-427 (1968) (flashlight).
- F *People v Sheets*, 138 Mich App 794, 799 (1984) (automobile).
- F *People v Jones*, 150 Mich App 440, 443-445 (1986) (unloaded operable pellet gun).
- F *People v Scurry*, 153 Mich App 437 (1986) (stick).
- F *People v Buford*, 69 Mich App 27 (1976) (boot).
- F *People v Bates*, 55 Mich App 1 (1974) (pool cue).

- F *People v Sanders*, 58 Mich App 512 (1975) (chair).
- F *People v Knapp*, 34 Mich App 325, 332-334 (1971) (broomstick).
- F Compare *People v Van Diver*, 80 Mich App 352 (1977) (bare hands not “dangerous weapon”).
- F Compare *People v Malkowski*, 198 Mich App 610, 613-614 (1993) (human teeth not “dangerous weapon”).
- F Compare *People v Stevens*, 409 Mich 564 (1980) (totally inoperable pistol not “dangerous weapon”).

A weapon need not be admitted into evidence, as long as there is testimony describing the weapon and its use. *People v Flanagan*, 129 Mich App 786, 797 (1983).

Whether an instrument or object is in fact used as a “dangerous weapon” is a question of fact. *People v Buford*, 69 Mich App 27, 32 (1976).

Whether a defendant is “armed with a weapon” or with an “article used or fashioned” as a weapon is a question of fact. *People v Parker*, 417 Mich 556, 565-566 (1983).

## E. “By Blood or Affinity”

The CSC Act punishes incest, as it is commonly known, regardless of the parties’ consent. *People v Goold*, 241 Mich App 333, 335 n 1 (2000). But instead of using the term “incest” to describe the relationship between the perpetrator and victim, the Act uses the term “by blood or affinity” followed by a *degree* of relation.

CSC I and II prohibit the sexual penetration or contact of a victim related to the perpetrator “by blood or affinity” to the *fourth degree* in the following circumstances:

- F When the victim is at least 13 but less than 16 years of age.\* MCL 750.520b(1)(b)(ii) (CSC I—Penetration); and MCL 750.520c(1)(b)(ii) (CSC II—Contact).
- F When the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(h)(i) (CSC I—Penetration); and MCL 750.520c(1)(h)(i) (CSC II—Contact).

CSC III and IV prohibit the sexual penetration or contact of a victim related to the perpetrator “by blood or affinity” to the *third degree* in the following circumstance:

- F When the sexual penetration or contact “occurs under circumstances not otherwise prohibited” in the CSC chapter. MCL 750.520d(1)(d) (CSC III—Penetration); and MCL 750.520e(1)(d) (CSC IV—Contact).

\*See Section 2.5(B).

\*See Sections 2.5(O), 2.5(N), 2.5(P), and 2.5(S), respectively.

## 1. Degrees of Relationships

The rules of civil law apply when computing the degrees of affinity or consanguinity. See *Boyer v Backus*, 282 Mich 701 (1937), which also supplied the method of computation:

“The method of computing degrees of consanguinity by the civil law is to begin at either of the persons claiming relationship, and count up to the common ancestor, and then downwards to the other person, in the lineal course, calling it a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they are related.” *Id.* at 705, quoting *Van Cleve v Van Fossen*, 73 Mich 342, 345 (1889).

The commentary to CJI2d 20.4 (Complainant Between Thirteen and Sixteen Years of Age) provides a Table of Consanguinity. Also contained within this commentary are the familial relationships for the first four degrees of affinity, as follows:

- First Degree Relationships (parents, children)
- Second Degree Relationships (grandparents, brothers, sisters, grandchildren)
- Third Degree Relationships (great-grandparents, uncles, aunts, nephews, nieces, great-grandchildren)
- Fourth Degree Relationships (great-great-grandparents, great-uncles, great-aunts, first cousins, grand-nephews, grand-nieces, great-great-grandchildren)

## 2. “Affinity”

The term “by blood or affinity” is undefined in the CSC Act. However, “affinity” was defined in *People v Denmark*, 74 Mich App 402, 408 (1977), quoting *Bliss v Caille Brothers Co*, 149 Mich 601, 608 (1907), as follows:

“Affinity is the relation existing in consequence of marriage between each of the married persons and the blood relatives of the other, and the degrees of affinity are computed in the same way as those of consanguinity or kindred. A husband is related, by affinity, to all the blood relatives of his wife, and the wife is related, by affinity, to all blood relatives of the husband.”

It is important to note that, while helpful, the Table of Consanguinity accompanying CJI2d 20.4 is not all encompassing. It does not, for instance, include “step” or “in-law” relationships. However, some Court of Appeals opinions have construed “affinity” to encompass relationships between a brother-in-law and sister-in-law and between a stepbrother and stepsister.

- *People v Denmark*, 74 Mich App 402 (1977):

In the first appellate opinion to decide the constitutionality of the CSC I (affinity) statute, the Court of Appeals held that “affinity” includes the

relationship between brother-in-law and sister-in-law. The defendant in *Denmark* was convicted of CSC I for raping his wife's 13-year-old sister. On appeal, he claimed that the CSC I statute was unconstitutionally vague because the word "affinity" was undefined. Because "affinity" was not defined, defendant argued he did not have notice of the prohibition against sexual intercourse with a prosecution witness. The Court of Appeals disagreed, holding that "affinity" was not unconstitutionally vague because *Bliss v Caille Brothers Co, supra*, had provided a clear and common definition of the term. Finally, the Court said defendant had been given proper notice of the prohibited conduct because intercourse with a female under 16 years of age had been a crime even before the enactment of the CSC Act.

- *People v Armstrong*, 212 Mich App 121 (1995):

In holding that "affinity" encompasses relationships between stepbrothers and stepsisters, the Court of Appeals declined to use the *Bliss* definition of "affinity" and instead relied upon statutory construction, dictionary definitions, and the factual and legal context of the case. In *Armstrong*, the defendant was convicted of CSC II for sexually assaulting his 15-year-old stepsister\*. On appeal, he argued that he was not related to the victim by affinity to the fourth degree. The Court rejected this argument, first finding the term "affinity," despite its definition in *Bliss*, and despite *Denmark's* view that it had an accepted meaning, was "not capable of precise definition." *Id.* at 125. The Court also noted that the Supreme Court in *Bliss* expressly limited the applicability of the definition of "affinity" to matters of judicial or juror bias. *Id.* at 126.

To resolve the case, the Court turned to principles of statutory construction. It construed "affinity" according to its "common and approved usage." *Id.* at 127. The Court, using the *Random House College Dictionary* (rev ed), noted that the common and ordinary meaning of "affinity" is marriage: "relationship by marriage or by ties other than those of blood." *Id.* at 128. The Court used the same dictionary to define the word "step": "a prefix used in kinship terms denoting members of a family related by the remarriage of a parent and not by blood." *Id.* Taken together, the Court concluded that the "defendant and the victim were related by affinity because they were family members related by marriage." *Id.* Finally, the Court noted that if "affinity" did not encompass stepbrothers and stepsisters, the CSC Act would yield absurd results:

"If the term were not so construed, then the first- and second-degree criminal sexual conduct statutes would impose a penalty more severe where the perpetrator sexually assaulted a spouse's brother or sister than where the perpetrator sexually assaulted a stepbrother or stepsister. In this time of divorce, remarriage, and extended families, we see no reason why the Legislature would give enhanced protection to a victim related to a perpetrator as an in-law but not to a victim related to a perpetrator as a stepbrother or stepsister." *Id.*

\*Defendant's father married the victim's mother.

### 3. Adoption

The CSC Act is silent on whether “adopted” children are related by “blood or affinity” to their parents or step-parents or to other extended family members. Moreover, as of the publication date of this Benchbook, no published Michigan appellate case has decided this issue. However, certain portions of the adoption code may be instructive,\* for they treat the adopted person as having been born to the adopting parents, making the adopting parents liable for all duties and entitling them to all rights of the natural parents. MCL 710.60(1)-(2) states as follows:

“(1) After the entry of the order of adoption, the adoptee shall, in case of a change of name, be known and called by the new name. *The person or persons adopting the adoptee then stand in the place of a parent or parents to the adoptee in law in all respects as though the adopted person had been born to the adopting parents and are liable for all the duties and entitled to all the rights of parents.*

“(2) *After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons, and the adopted person becomes an heir at law of the adopting parent or parents, and an heir at law of the lineal and collateral kindred of the adopting parent or parents.* After entry of the order of adoption, an adopted child is no longer an heir at law of a parent whose rights have been terminated under this chapter [Adoption Code] or chapter XIIA [Juveniles and Juvenile Division] or the lineal or collateral kindred of that parent, nor is an adopted adult an heir at law of a person who was his or her parent at the time the order of adoption was entered or the lineal or collateral kindred of that person, except that a right, title, or interest vesting before entry of the final order of adoption is not divested by that order.” [Emphasis added.]

#### F. “Circumstances”

For criminal liability under the CSC Act, a sexual penetration or contact must be accompanied by one or more “circumstances.” Michigan courts typically refer to these “circumstances” as either “aggravating circumstances” or “aggravating factors.”\*

A single act of sexual penetration (or contact), even when accompanied by multiple “aggravating circumstances,” may give rise to only “one criminal charge for purposes of trial, conviction, and sentencing.” *People v Johnson*, 406 Mich 320, 331 (1979). Thus, there cannot be two convictions for one sexual penetration or contact.

Multiple “aggravating circumstances” constitute alternative means of proving a single act of sexual penetration (or contact). *People v Gadomski*, 232 Mich App 24, 31 (1998). Jury unanimity is not required for each alternate theory or “aggravating circumstance.” See *Id.* (“[W]hen a statute lists alternative means of committing an offense, which . . . in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories.”)

\**Denmark and Armstrong*, while instructive, do not resolve this precise issue. See Section 2.5(E)(2).

\*See Section 2.1 for further explanation on the use of these terms.

A single charged offense involving multiple sexual acts (penetrations or contacts), but not multiple statutory “circumstances,” requires a jury to unanimously agree on *which* act was proven beyond a reasonable doubt. *People v Yarger*, 193 Mich App 532, 536-537 (1992). However, a *specific* jury unanimity instruction is not always required; a *general* jury unanimity instruction will sometimes suffice. *People v Cooks*, 446 Mich 503, 530 (1994). A specific jury instruction is required when the alleged sexual acts are materially distinct (i.e., where they are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), when jurors may become confused, or when the jurors disagree about the factual basis supporting the offense. In *Cooks*, the defendant was charged with one count of CSC I (under 13 years of age), although the victim’s testimony revealed that defendant fondled her breasts and vagina and anally penetrated her with his penis on three consecutive days. Defendant was convicted by jury of CSC II. Regarding the jury unanimity instruction, the Michigan Supreme Court stated the following:

“[W]hen the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant’s guilt. When neither of these factors is present, as in the case at bar, a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his right to a unanimous verdict.” *Id.* at 530.

### G. “Commission of Any Other Felony”

\*MCL 750.316.

Similar in concept to the “felony-murder” statute,\* the CSC Act contains provisions that elevate the charges when another felony is committed. But while the felony-murder statute specifically delineates its predicate felonies, the CSC Act does not. Instead, the CSC Act allows elevation of charges when the sexual penetration or contact occurs under circumstances involving the commission of “any other felony.” MCL 750.520b(1)(c) (CSC I—Penetration); and MCL 750.520c(1)(c) (CSC II—Contact).

\*This “force or coercion” requirement also applies to the “Armed with a Weapon” element. See Section 2.5(D).

This “commission of any other felony” element includes a “force or coercion” requirement, despite no explicit reference to “force or coercion.”\* *People v Thompson*, 117 Mich App 522, 525-526 (1982). A “force or coercion” requirement is imputed into this element because the Court of Appeals, in *Thompson, supra* at 526, held that the affirmative defense of consent applies to the “commission of any other felony” element. Consent is defined as a non-coerced and non-forced sexual act. *People v Jansson*, 116 Mich App 674, 682 (1982); and CJI2d 20.27(1). For more information on consent, including its definition and applicability, see Section 4.7. For more information about this issue generally, see Saltzman, Michigan Criminal Law (2d ed), § 5-3(f), p 389-390.

## 1. Construction of “Felony”

The CSC Act does not define the term “felony.” However, the Penal Code and Code of Criminal Procedure supply two similar definitions of “felony” that may be instructive. The Penal Code defines “felony” as follows:

“The term ‘felony’ when used in this act, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison.” MCL 750.7.

The Code of Criminal Procedure defines “felony” as follows:

“‘Felony’ means a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.” MCL 761.1(g).

Although most criminal offenses are easily identified as “misdemeanors” or “felonies,” some are not: some are expressly labeled as “misdemeanors” but defined as “felonies”—or vice versa. For example, the Legislature created the commonly-known “high court,” “circuit court,” or “two-year” misdemeanors, which are offenses expressly labeled as misdemeanors even though they authorize imprisonment for not more than two years. See, e.g., MCL 750.520e (CSC IV); MCL 750.479 (Resisting and Obstructing a Peace Officer); and MCL 750.414 (Joyriding).

In the reverse situation, the Legislature has expressly labeled some offenses as “felonies” even though the offenses only authorize imprisonment for one year or less. See, e.g., MCL 436.1909 (Unlicensed Selling of Liquor); and MCL 436.1919 (Forging Documents, Labels, or Stamps). These one-year felony offenses do not fit within the Penal Code definition of “felony” because they do not authorize confinement in state prison.\* MCL 769.28 (Commitment or Sentence of Person for Maximum of 1 Year).

The question under the CSC Act is whether these two-year misdemeanors and one-year felonies qualify as “any other felony.” As of this Benchbook’s publication date, no published Michigan appellate case has decided these precise issues. However, appellate courts have decided non-CSC cases involving the applicability of Penal Code and Code of Criminal Procedure provisions to two-year misdemeanors. These cases have held that two-year misdemeanors are “felonies” under the Code of Criminal Procedure for purposes of habitual offender, probation, and consecutive sentencing provisions, but not under the Penal Code for purposes of supporting another criminal charge.

In *People v Williams*, 243 Mich App 333 (2000), the Court of Appeals held that the two-year resisting-arrest offense is by definition a “misdemeanor” under the Penal Code and cannot be used to support a subsequent charge of absconding on a felony bond:

\*These offenses, however, fit within the Code of Criminal Procedure’s “felony” definition because they are expressly labeled as felonies. MCL 761.1(g).

“Although a misdemeanor that may result in two years’ imprisonment may be deemed a felony for purposes of the habitual offender, probation, and consecutive sentencing provisions of the Code of Criminal Procedure, MCL 760.1 *et seq.*, it cannot be deemed a felony for purposes of the Penal Code. *People v Smith*, 423 Mich 427, 434; 378 NW2d 384 (1985). Resisting arrest is by definition a misdemeanor under the Penal Code, MCL 750.479, and, therefore, cannot serve as a felony for purposes of establishing the crime of absconding on a felony bond.” *Id.* at 335.

In *People v Baker*, 207 Mich App 224 (1994), the Court of Appeals held that the two-year resisting arrest offense could not be used to support a charge of possession of a firearm during the commission of a felony:

“We agree with defendant’s position that the provisions of the Penal Code . . . govern whether resisting arrest is a felony for purposes of the felony-firearm statute. *People v Smith*, 423 Mich 427, 444; 378 NW2d 384 (1985). Under the Penal Code, resisting arrest is a misdemeanor because it is specifically designated as such in MCL 750.479. Cf. *People v Alford*, 104 Mich App 255; 304 NW2d 541 (1981). Therefore, the trial court erred when it instructed the jury that resisting arrest could establish the felony element of the felony-firearm charge.” *Id.* at 225.

## 2. Construction of “Any Other” Felony

The “any other” felony element is satisfied if the circumstances surrounding the sexual penetration or contact involve any felony other than the sexual penetration or contact committed upon that victim. This may even include another CSC offense. In *People v White*, 168 Mich App 596 (1988), the defendant was convicted of five counts of CSC I and one count of breaking and entering with intent to commit a felony. Three of the five CSC I convictions involved one victim, Lula, while the two remaining CSC I convictions involved another victim, Gabrielle. The trial court instructed the jury that the “other felony” for the three CSC I offenses (involving Lula) could either be the breaking and entering charge *or* the criminal sexual conduct committed upon Gabrielle. *Id.* at 599. The Court of Appeals construed the CSC Act’s “any other felony” language broadly, and held as follows:

“We read ‘any other felony’ as meaning a felony other than the one committed. Thus, the prohibition against double jeopardy does not bar the use of evidence of criminal sexual conduct upon another victim as the “other felony” which elevates the criminal sexual conduct committed upon the first person to first degree.” *Id.* at 604.

\*MCL 750.110.

The felony of breaking and entering an occupied dwelling with intent to commit CSC\* also satisfies the “any other felony” requirement of CSC I. *People v Pettway*, 94 Mich App 812, 818 (1980).



### 3. Double Jeopardy Concerns

Conviction of both the predicate and compound felony under MCL 750.520b(1)(c) (CSC I involving commission of any other felony) does not violate constitutional protections against double jeopardy.\* In *People v Robideau*, 419 Mich 458, 466 (1984), a consolidated opinion of four cases, the Michigan Supreme Court held that convictions for the predicate felonies of kidnapping or armed robbery and for the compound felony of CSC I involving the commission of any other felony do not violate the double jeopardy protections under either the United States or Michigan constitutions.

**Note:** The predicate felony is the any “other felony”; the compound felony is the CSC offense that has “commission of any other felony” as its element.

Even though, as in *Robideau*, convictions for both the predicate felony and compound felony are permitted under the CSC Act, a defendant need not be convicted of the predicate felony to sustain the conviction for the compound felony. In *People v Warren*, 228 Mich App 336 (1998), rev’d on other grounds 462 Mich 415 (2000), the defendant was convicted of, among other charges, two counts of CSC I under MCL 750.520b(1)(c) (sexual penetration involving the commission of another felony), first-degree home invasion, and felony murder. The two CSC I convictions were based on the predicate felony of home invasion, which was also the predicate felony for the felony-murder conviction. At sentencing, the trial court vacated defendant’s home invasion conviction and sentence on the felony-murder conviction because “[c]onvictions of both felony murder and the underlying felony offend double jeopardy protections.” *Id.* at 354. On appeal, defendant contended that his CSC I convictions could not be supported because there was no longer the underlying felony of home invasion. The Court of Appeals disagreed, and held the following:

“[T]he criminal sexual conduct statute does not require that a person be *convicted* of the underlying felony in order to be convicted of CSC I in circumstances involving the commission of another felony. In convicting defendant of the CSC I charges, the jury necessarily found as a matter of fact that he committed acts of sexual penetration in circumstances involving the commission of another felony. It is immaterial whether defendant was subject to conviction for the other felony.” *Id.* at 355. [Emphasis in original.]

\*The same rationale presumably applies to CSC II offenses under MCL 750.520c(1)(c).

\*The CSC Act uses the phrase “under circumstances involving the commission of any other felony”; the phrase does not say “during the commission of any other felony.”

#### 4. The Sequence or Timing of the “Other Felony”

The sequence or timing of the “other felony” and the CSC offense is not crucial to sustain a CSC conviction based on the “other felony.”\* In *People v Jones*, 144 Mich App 1 (1985), the defendant was convicted of armed robbery and CSC I (commission of another felony) and CSC II (commission of another felony). The defendant, while carrying a stick, accosted the victim as she was entering a car borrowed from a friend. After telling her that he would not hurt her if she did as told, the victim dropped her purse, which defendant picked up. Defendant then directed her to a vacant lot where he raped her. Afterward he took off with the car keys and car. On appeal, defendant claimed insufficiency of the evidence to support his two CSC convictions, arguing the robbery of the victim’s purse was independent of the completed sexual acts, as it was completed *after* the sexual acts. The Court of Appeals disagreed with defendant’s argument:

“The Legislature . . . did not attempt to narrowly define the coincidence or sequence of the sexual act and the other felony; rather it chose to address the increased risks to, and the debasing indignities inflicted upon, victims by the combination of sexual offenses and other felonies by treating the sexual acts as major offenses when they occur ‘under circumstances involving the commission of any other felony.’” *Id.* at 4.

#### H. “Developmental Disability”

MCL 750.520a(b) defines “developmental disability” as:

“an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:

“(i) It originated before the person became 18 years of age.

“(ii) It has continued since its origination or can be expected to continue indefinitely.

“(iii) It constitutes a substantial burden to the impaired person’s ability to perform in society.

“(iv) It is attributable to 1 or more of the following:

“(A) Mental retardation, cerebral palsy, epilepsy, or autism.

“(B) Any other condition of a person found to be closely related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.”

The term “developmental disability” is contained within the definition of “mentally disabled”\* under MCL 750.520a(f):

“‘Mentally disabled’ means that a person has a mental illness, is mentally retarded, or has a *developmental disability*.” [Emphasis added.]

Although the term “developmental disability” is not expressly contained within the substantive CSC offenses, it is still a crime to sexually penetrate or contact a person with a “developmental disability” because it is a crime to

\*See Section 2.5(N).

commit such acts against a “mentally disabled” person. CSC I and II prohibit the sexual penetration and contact of a person who is “mentally disabled” in the following circumstances:

- F When the perpetrator is related to the victim by blood or affinity to the fourth degree.\* MCL 750.520b(1)(h)(i) (CSC I—Penetration); and MCL 750.520c(1)(h)(i) (CSC II—Contact).
- F When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit.\* MCL 750.520b(1)(h)(ii) (CSC I—Penetration); and MCL 750.520c(1)(h)(ii) (CSC II—Contact).

\*See Section 2.5(E).

\*See Section 2.5(T).

The CSC Act appears to impose criminal liability under the foregoing provisions regardless of whether the perpetrator knew or had reason to know about the victim’s mental disability. For more discussion on the CSC Act’s “mentally disabled” element, see Section 2.5(N).

Although no cases have construed the meaning of “developmentally disabled” under the CSC Act, the Court of Appeals, in *People v Burton*, 219 Mich App 278 (1996), held that a CSC victim was not “developmentally disabled” under MCL 600.2163a,\* a statute governing special courtroom arrangements. The Court determined that the victim was not “developmentally disabled” because she did not exhibit a retarded psychological profile until after the defendant beat her savagely (during the CSC attack), which was after her 18th birthday.

\*At the time *Burton* was decided, this statute contained a nearly identical definition of “developmentally disabled” as currently found under MCL 750.520a(b).

## I. “Force or Coercion”

The term “force or coercion” is used in each of the statutes that govern the four degrees of criminal sexual conduct. However, it is *defined* only in the statutes governing CSC I and CSC IV. MCL 750.520b(1)(f) (CSC I); and MCL 750.520e(1)(b) (CSC IV). The statutes governing CSC II and CSC III incorporate by reference the definition of “force or coercion” found in the CSC I statute. MCL 750.520c(1)(f) (CSC II); and MCL 750.520d(1)(b) (CSC III). Because the CSC IV statute contains its own definition of “force or coercion,” which is substantially similar to the CSC I definition, it does not cross-reference CSC I.

MCL 750.520b(1)(f) defines “force or coercion” for purposes of CSC I-III as follows:

“Force or coercion includes but is not limited to any of the following circumstances:

- “(i) When the actor overcomes the victim through the actual application of physical force or physical violence.
- “(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
- “(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute

this threat. As used in this subdivision, ‘to retaliate’ includes threats of physical punishment, kidnapping, or extortion.

“(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

“(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.”

The definition of “force or coercion” in the CSC IV statute, MCL 750.520e(1)(b), is substantially similar to the definition in CSC I above. Its principal difference, however, lies in subparagraph (v), which states:

“(v) When the actor achieves the sexual contact through concealment or by the element of surprise.”

“Force or coercion” includes, but is not limited to, acts of physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or concealment or surprise. *People v Malkowski*, 198 Mich App 610, 613 (1993). Appellate courts have consistently held that “force or coercion” is not limited to these examples, and each case must be examined on its own facts in light of all the circumstances. *People v Crippen*, 242 Mich App 278, 283 n 2 (2000); and *People v Cowley*, 174 Mich App 76, 81 (1989). No knowledge is required for the element of “force or coercion.” *People v Brown*, 197 Mich App 448, 449-450 (1992).

CJI2d 20.15\* also defines “force or coercion.” This instruction states in pertinent part:

“‘Force or coercion’ means that the defendant either used physical force or did something to make [name complainant] reasonably afraid of present or future danger.”

**Note:** CJI2d 20.15 does not include “unethical medical treatment” or “concealment” or “surprise” within its definition, as does MCL 750.520b(1)(f)(iv)-(v) (CSC I—Penetration); and MCL 750.520e(1)(b)(iv)-(v) (CSC IV—Contact).

CJI2d 20.24 (Definition of Sufficient Force) provides examples of “sufficient force”:

- 1) It is enough force if the defendant overcame the victim by physical force;

**Note:** This element of the jury instruction may need modification in light of the Michigan Supreme Court’s opinion in *People v Carlson*, 466 Mich 130 (2002), discussed below, which held that the “force” necessary to convict a person under CSC III does not include a requirement of “overcoming” the victim. Instead, the “force” needed is such force that either induces the victim to submit to sexual penetration (or contact) or seizes control of the victim in a manner to facilitate the accomplishment of sexual penetration (or contact) without regard to the victim’s wishes. *Id.* at 140.

\*See also CJI2d 20.9(5), Personal Injury—Use of Force or Coercion, which is used in conjunction with CJI2d 20.1 (CSC—1st) and 20.2 (CSC—2nd).

- 2) It is enough force if the defendant threatened to use physical force on the victim and the victim believed the defendant had the ability to carry out those threats;
- 3) It is enough force if the defendant threatened to get even with the victim in the future, and the victim believed the defendant had the ability to carry out those threats;
- 4) It is enough force if the defendant threatened to kidnap the victim, or threatened to force the victim to do something against his or her will, or threatened to physically punish someone, and the victim believed the defendant had the ability to carry out those threats;
- 5) It is enough force if the defendant was giving a medical exam or treatment and did so in a way or for a reason that is not recognized as medically acceptable. A physical exam by a doctor that includes inserting fingers into the vagina or rectum is not in itself criminal sexual conduct. You must decide whether the defendant did the exam or treatment as an excuse for sexual purposes and in a way that is not recognized as medically acceptable; and
- 6) It is enough force if the defendant, through concealment or by the element of surprise, was able to overcome [achieve sexual contact with]\* the victim.

\*Use bracketed language when CSC IV is charged.

In the rest of this section, the reader will find examples of cases addressing the foregoing uses of force or coercion.

### 1. Actual Application of Physical Force or Physical Violence

This subsection covers circumstances in which the perpetrator uses the actual application of physical force or physical violence against the victim. MCL 750.520b(1)(f)(i) (CSC I); and MCL 750.520e(1)(b)(i) (CSC IV).

The prohibited “force” under the “force or coercion” element is such force that either induces the victim to submit to sexual penetration (or contact) or seizes control of the victim in a manner to facilitate the accomplishment of sexual penetration (or contact) without regard to the victim’s wishes. “Force or coercion” does not include a requirement of “overcoming” the victim. *People v Carlson*, 466 Mich 130 (2002).

In *Carlson*, the Michigan Supreme Court dealt with a case where the complainant, although expressly stating that she did not want to engage in sexual intercourse, never resisted the defendant’s actions in any physical way. The defendant in *Carlson* drove the complainant, a 16-year-old fellow high school student, to a YMCA parking lot, where they engaged in consensual kissing and digital penetration. After engaging in this activity, the defendant expressed a desire to have sexual intercourse. However, the complainant repeatedly said “no” to defendant’s advances and “I don’t want to” to his questions regarding the reasons why she did not want to engage in sexual intercourse. Defendant next asked whether he could “just stick it in once,” repeating this question, or at least its essential nature, several times. The complainant did not answer these questions because she did not want to

\*The dicta in *Patterson* was the following statement: “The force to which reference is made is not the force inherent in the act of penetration but the force used or threatened to overcome or prevent resistance by the defendant,” which actually was quoted from a California appellate opinion, which in turn was quoting from Wharton, Criminal Law (14th ed. 1980). *Id.* at 523.

answer the defendant anymore. Thereafter, defendant engaged in sexual intercourse with the complainant, who did not resist his actions, i.e., she did not physically restrain or push him away. Afterward, the defendant was charged with CSC III.

At the preliminary examination, the district court refused to bind over the defendant for trial, finding insufficient evidence of “overcoming” the victim through the use of physical force. The circuit court affirmed. The Court of Appeals reversed and remanded, finding sufficient evidence of force or coercion because the defendant engaged in sexual penetration over the complainant’s refusals (and because he may have “surprised” the complainant). The Michigan Supreme Court vacated the Court of Appeals opinion and remanded the case to the district court, finding that the district court may have improperly relied upon dicta in *People v Patterson*, 428 Mich 502 (1987), a case involving “highly peculiar circumstances,” according to the *Carlson* Court, when it found that the “force or coercion” element requires proof that a defendant “overcame” the victim.\*

After first establishing that the statement in *Patterson* was dicta, the Supreme Court held that the “force” necessary to convict someone under the CSC III statute’s “force or coercion” element does not include a requirement of “overcoming” the victim:

“[W]e now consider whether the statutory provision at issue, MCL 750.520d(1)(b), prohibiting the accomplishment of a sexual penetration by ‘force or coercion’ includes any requirement of ‘overcoming’ the victim. As we will explain, we conclude that it does not because imposing such a requirement would amount to the improper insertion of an additional element beyond that required by the statutory language. In other words, if ‘force or coercion’ is used to accomplish a sexual penetration, the statute has been violated.” *Id.* at 139-140.

Next, the Supreme Court articulated the amount of “force” needed to sustain a conviction under the CSC III statute’s “force or coercion” element:

“To be sure, the ‘force’ contemplated in MCL 750.520d(1)(b) does not mean ‘force’ as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor, as we have observed, does it follow that the force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. In other words, the requisite ‘force’ for a violation of MCL 750.520d(1)(b) does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited ‘force’ encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim’s wishes.” *Id.* at 140.

In *People v Patterson*, 428 Mich 502 (1987), the Supreme Court found that the placing of a hand on a sleeping person's genital area, without more, is not the application of "physical force" so as to satisfy the "force or coercion" element in CSC offenses.\* The victim in *Patterson* was awakened in her bedroom by the feel of defendant's hand on her genital area, outside of her underwear. After calling out "Who is it?" the victim felt a stubbly face in the dark, and rolled over to turn on the light. As she did so, the hand was removed from her genital area. At trial, the defendant was convicted of CSC IV (force or coercion—application of physical force). The Court of Appeals reversed the conviction, based on insufficiency of the evidence of the application of "physical force." The Supreme Court agreed with the Court of Appeals in principle, but reduced the conviction to simple battery instead of reversing it. The Court reviewed the Legislative history of the CSC IV statute and concluded the Legislature did not intend to include defendant's conduct within the definition of "force or coercion." Noting that defendant could have been, but was not, charged with CSC IV ("physically helpless" victim), the Court wrote:

"If this Court were to interpret defendant's conduct in this case to be included within the provisions of subsection (1)(a) [force or coercion, which is now subsection (1)(b)], this would render the language of subsection (1)(b) [physically helpless victim, which is now subsection (1)(c)] of the statute a nullity." *Id.* at 527.

Although it recognized that the types of force actionable under the CSC IV statute are "not limited to" those examples listed in the statute, the Court declined to fit defendant's conduct within this "not limited to" language because the victim was asleep at the time of the touching:

"While it is true . . . that the Legislature's definition of 'force or coercion' is not exclusive, we decline to expand the definition of force or coercion to include the defendant's conduct in this case. The 'included but not limited to' language with direct reference to [CSC I (force or coercion definitions)] are all examples where the victim would be awake." *Id.* at 526.

**Note:** Defendants who sexually penetrate or contact a sleeping victim may be charged under the CSC Act's "physically helpless" provisions, as defined in MCL 750.520a(j). Defendants who sexually penetrate or contact an unconscious victim may be charged under the Act's "physically helpless" or "mentally incapacitated" provisions, as defined in MCL 750.520a(j) and MCL 750.520a(h), respectively. For more information on "physically helpless," see Section 2.5(S). For more information on "mentally incapacitated," see Section 2.5(P).

Following the rationale in *Patterson*, the Court of Appeals in *People v Berlin*, 202 Mich App 221 (1993), held that the act of taking a victim's hand and placing it on the defendant's crotch was not the "physical application of force" under CSC IV (force or coercion). In *Berlin*, after conducting a post-examination consultation with the victim, and after hugging and kissing her goodbye, the defendant, a gynecologist, "took [the victim's] hand and placed it on his crotch, over his clothes and lab coat," causing the victim to quickly

\*This conduct, however, may be actionable under other components of "force or coercion" or in circumstances involving a mentally incapable, mentally incapacitated, or physically helpless victim. See Sections 2.5(O), 2.5(P), and 2.5(S), respectively.

remove her hand. *Id.* at 222. According to the victim, the defendant did not “grab” or “pull” her hand, nor did he hurt or threaten her. *Id.* at 226. Additionally, the defendant offered no resistance when the victim pulled her hand away. *Id.* Affirming the trial court’s refusal to bind the defendant over on CSC IV (force or coercion), the Court of Appeals, after noting that CSC IV did not then contain a “concealment or surprise” provision, held as follows:

“In light of the ordinary meaning of the words ‘force or coercion,’ of the examples given in subsections i through iv of the statute, and of the *Patterson* Court’s interpretation, we believe that the district court did not abuse its discretion in finding that the force or coercion required by the statute was absent in this case. To hold otherwise would be to ignore the Legislature’s exclusion of the concealment or surprise provision from the fourth-degree criminal sexual conduct statute.” *Id.* at 226.

\*See Section 2.5(T).

The pinching of buttocks is the actual application of physical force. In *People v Premo*, 213 Mich App 406 (1995), another panel of the Court of Appeals cast doubt on the efficacy of *Berlin*, saying, “We are troubled by the conclusion reached by the Court in *Berlin* on the basis of the reported facts . . . but because we find *Berlin* to be distinguishable from this case we need not resolve this concern.” *Premo, supra* at 409. In *Premo*, the defendant, a teacher at Ferndale High School, was convicted of three counts of CSC IV for pinching three students’ buttocks while on school grounds. The Court of Appeals held that the act of pinching requires the “actual application of physical force” because “it requires a person to exert strength or power on another person.” *Id.* In addition to finding the requisite amount of “force,” the Court found that defendant’s position of authority\* as a teacher also constituted “coercion”:

“The district court determined that defendant’s actions constituted coercion because defendant was in a position of authority over his victims. Apparently, the district court considered defendant to be in a position of authority because he was a teacher and the victims were students. Although the circuit court did not address whether defendant’s conduct constitutes coercion, we conclude that it does . . . . We believe that defendant’s actions constituted implied, legal, or constructive coercion because, as a teacher, defendant was in a position of authority over the student victims and the incidents occurred on school property. Defendant’s conduct was unprofessional, irresponsible, and an abuse of his authority as a teacher. Accordingly, we conclude that defendant’s conduct in this case is sufficient to constitute coercion under [CSC IV].” *Id.* at 410-411.

## 2. Threatening to Use Force or Violence

This subsection covers circumstances in which the perpetrator coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes the perpetrator has the present ability to execute the threats. MCL 750.520b(1)(f)(ii) (CSC I); and MCL 750.520e(1)(b)(ii) (CSC IV).

In *People v Khan*, 80 Mich App 605 (1978), the Court of Appeals dealt with a factual scenario in which the defendant drove a group of people (the victim,



her sister, her brother, some infant children, and another man) to his garage. Once there, he pointed a rifle at the victim's brother, which the victim witnessed; he then dropped the rifle and walked out of the garage with the victim's brother. Next, he threatened to kill the victim's sister. Afterward, when he was alone with the victim in the garage, he began to undo the victim's pants. When she resisted, the defendant slapped her face and neck, then raped her. Defendant was convicted of CSC III (force or coercion). On appeal, he claimed it was error for the trial court to admit the victim's testimony concerning his handling of the rifle, for there was no showing that he threatened her with the rifle or that she even noted the rifle's presence. The Court of Appeals held that the testimony was relevant and material because there was a "threat to use force or violence" and the "present ability" to execute the threat:

"[C]omplainant had witnessed defendant pointing a rifle at her brother, had heard defendant threaten to kill her sister and had received a hard slap from defendant when she spurned his advances. At the very least, then, the jury could have interpreted the slap as a 'threat \* \* \* to use force or violence' and it could have considered the availability of the rifle together with defendant's previous threatening words and deeds as justifying a belief in complainant that defendant '[had] the present ability to execute these threats.'" *Id.* at 610.

### 3. Threatening to Retaliate in the Future

This subsection covers circumstances in which the perpetrator coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the perpetrator has the ability to execute this threat. As used in this section, "to retaliate" includes threats of physical punishment, kidnapping, or extortion. MCL 750.520b(1)(f)(iii) (CSC I); and MCL 750.520e(1)(b)(iii) (CSC IV).

Post-sexual assault threats of future harm to the victim (or the victim's family) to deter reporting of the crime may constitute the crime of extortion under MCL 750.213. *People v Trevino*, 155 Mich App 10, 18-19 (1986). For more information on the crime of extortion, see Section 3.14. For more information on the crime of kidnapping, see Section 3.19.

### 4. Medical Treatment or Examination in a Manner Medically Recognized as Unethical or Unacceptable

This subsection covers circumstances in which the perpetrator engages in medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable. MCL 750.520b(1)(f)(iv) (CSC I); and MCL 750.520e(1)(b)(iv) (CSC IV).\*

The objective of the foregoing statutes is to "prevent a person in the medical profession from taking such an unconscionable advantage of the patient's vulnerability and abusing the patient's trust and unwitting permission of the

\*See also Section 3.28, "Sexual Intercourse Under Pretext of Medical Treatment," and MCL 750.90.

touching under the belief that it is necessary.” *People v Capriccioso*, 207 Mich App 100, 105 (1994).

The term “medical treatment” is to be construed broadly and includes other forms of health care beyond those practiced by medical doctors. In *People v Regts*, 219 Mich App 294 (1996), the Court of Appeals construed “medical treatment” to include psychotherapy by psychologists. In making this finding, the Court used the definition of “practice of medicine” under the Public Health Code, MCL 333.17001(1)(d):

“‘Practice of medicine’ means the diagnosis, treatment, prevention, cure, or relieving of a human disease, ailment, defect, complaint, or other physical or mental condition, by attendance, advice, device, diagnostic test, or other means, or offering, undertaking, attempting to do, or holding oneself out as able to do, any of these acts.”\*

The *Regts* Court concluded that “this broad definition of ‘practice of medicine’ . . . goes beyond the activities of medical doctors and can be read to include the practice of psychotherapy.” *Id.* at 297. The Court also found that a restrictive view of “medical treatment” would not meet the legislative intent of the CSC statute:

“[W]e see no logical reason why the Legislature would wish to restrict applicability of the statute to medical doctors only. The clear purpose of the statute is to protect patients from abuse by professionals who, under the guise of treatment, take advantage of the patient’s vulnerabilities to achieve a sexual purpose. We do not believe that the Legislature would view the potential harm from a medical doctor different from the potential harm from a psychologist, nurse, or other health-care professional. In interpreting a criminal statute, we must give effect to the Legislature’s intent . . . . Therefore, we conclude that ‘medical treatment’ under the criminal sexual conduct statute should be read broadly to include forms of health care beyond just those practiced by medical doctors. Specifically, it should be read to include psychotherapy practiced by psychologists.” *Id.* at 297-298.

In *Regts*, a case involving a no contest plea to CSC IV and attempted CSC IV, the Court of Appeals followed the rationale in *People v Premo*, 213 Mich App 406 (1995), and found sufficient evidence of “coercion” under the position of authority\* theory. The Court held that defendant manipulated his therapy sessions with the victim to establish a relationship that permitted his sexual advances to be accepted without protest. *Regts, supra* at 295-296.

Medical testimony is necessary to prove that a defendant’s behavior during a medical examination was unethical or unacceptable. In *Capriccioso, supra*, an emergency room physician was convicted of eight counts of CSC IV (unethical or unacceptable medical examination) for improperly touching seven of his patients. In reviewing the constitutionality of this section in light of the entire text of the CSC statute, the Court of Appeals determined that this CSC section proscribes the intentional touching of a patient “for sexual gratification under the pretense that the contact is necessary in the diagnosis of the patient’s ailment.” *Id.* at 105. The Court concluded that medical testimony is necessary in such cases:

\*The Court of Appeals has held that this definition is not facially overbroad or vague. *People v Rogers*, 249 Mich App 77, 105-106 (2001).

\**People v Premo* is discussed at Section 2.5(I)(1). See also Section 2.5(T), “Position of Authority.”

“In order to determine whether a person has intentionally touched a patient’s intimate parts for an improper purpose under such pretense, *medical testimony is necessary in determining whether the conduct was necessary in rendering the particular treatment.*” *Id.* [Emphasis added.]

See also *People v Thangavelu*, 96 Mich App 442, 450 (1980), in which the Court of Appeals held that even cunnilingus performed by a doctor should be supported by medical testimony. (“While no one would argue that medical testimony is necessary to prove that cunnilingus is not acceptable and ethical medical treatment, we believe the better view is to require medical testimony in prosecuting violations under MCL 750.520b(1)(f)(iv) [CSC I—Unethical medical treatment].”)

## 5. Concealment or Element of Surprise

This subsection covers circumstances in which victims are sexually penetrated or contacted either through concealment or by the element of surprise. MCL 750.520b(1)(f)(v) (CSC I); and MCL 750.520e(1)(b)(v) (CSC IV).

Although this provision covers a wide array of potential factual scenarios, it does not *explicitly* criminalize sexual activity achieved through fraud, misidentification, or impersonation.\* Even so, the Court of Appeals, in *People v Crippen*, 242 Mich App 278 (2000), held that a defendant who employs a disguise to make the victim misidentify him is sufficient evidence of “concealment” and hence “coercion” under the CSC Act.

In *Crippen*, the victim lived in an apartment with her fiancé. One evening while asleep on the couch, she awoke and found a man standing in the living room wearing “fishnet, thigh-high tights, shorts and a short-sleeved shirt” and a “turban-like garment” covering his “head and face.” The victim thought this turbaned man was her fiancé. The man then removed the victim’s clothes and fondled and digitally penetrated her. The victim called out her fiancé’s name and received no response. Thereafter, the man left the apartment. While enroute to the bathroom, the victim heard snoring and looked in the bedroom and saw her fiancé asleep. Realizing the turbaned man was a stranger, the victim called police. The police arrested the defendant the next evening when he was found peeking into the victim’s apartment.

Defendant was charged with CSC III (force or coercion). On appeal, he claimed the circuit court abused its discretion in reversing the district court’s dismissal of the CSC charge at the preliminary examination, for there was insufficient evidence of force or coercion. The Court of Appeals disagreed and affirmed the circuit court. In noting that “concealment” is not defined in the CSC Act, the Court of Appeals applied the “plain and ordinary” meaning of “concealment” by looking to the definition in the *Random House Dictionary* (1995): “to hide; cover or keep from sight; to keep secret; avoid disclosing or divulging.” *Crippen, supra* at 283. The Court also relied on *Regts, supra* at 296, which found “coercion” where defendant, who was the

\*For general background information, see Isaacson, Note, *Rape by Fraud or Impersonation: A Necessary Addition to Michigan’s Criminal Sexual Conduct Statute*, 44 Wayne L R 1781 (1999), and Falk, *Rape by Fraud and Rape by Coercion*, 64 Book L Rev 39 (Spring 1998).

victim's psychotherapist, manipulated therapy sessions to establish a relationship that would permit his sexual advances to be accepted without protest, "subjugat[ing] the victim into submitting to his sexual advances against her free will." Using the "plain and ordinary" meaning of "conceal," and the holding in *Regts*, the Court of Appeals held as follows:

"Applying the plain and ordinary, i.e., dictionary, meaning of the word 'conceal' to the facts of this case, we conclude that the evidence that defendant disguised himself, and took advantage of the complainant's misidentification of him as her fiance to induce her to submit to his sexual advances, was sufficient to establish the requisite coercion by concealment or surprise necessary for bindover." *Crippen, supra* at 283-284.

**Note:** Regarding the lack of an explicit provision governing misidentification and impersonation in the CSC Act, the Court of Appeals extended an invitation to the Legislature: "[W]e invite the Legislature to consider whether an amendment that explicitly includes sexual activity through misidentification or impersonation within the definition of force or coercion might state more directly the legislative intent under the criminal sexual conduct statutory scheme." *Id.* at 284 n 4.

On the issue of consent, the Court of Appeals remarked that the victim's consent was the product of defendant's subterfuge:

"The complainant did not knowingly consent to performing sexual acts *with defendant*; only through defendant's concealment of his identity was he able to persuade the victim to submit to his sexual advances." *Id.* at 284. [Emphasis in original.]

## 6. Uses of Force or Coercion Not Specified by Statute\*

A finding of "force or coercion" is "not limited to those situations specifically delineated" in the "force or coercion" definitions of the CSC Act. *People v Cowley*, 174 Mich App 76, 81 (1989). MCL 750.520b(1)(f) (CSC I) provides:

"Force or coercion *includes but is not limited to* any of the following circumstances:"\* [Emphasis added.]

This provision is not unlimited in scope. The Michigan Supreme Court has limited this provision to victims who are awake at the time of the sexual act. In *People v Patterson*, 428 Mich 502 (1987), a case involving a defendant who placed his hand on a sleeping victim's genital area, the Supreme Court stated:

"While it is true . . . that the Legislature's definition of 'force or coercion' is not exclusive, we decline to expand the definition of force or coercion to include the defendant's conduct in this case. The 'included but not limited to' language with direct reference to [CSC I (force or coercion definitions)] are all examples where the victim would be awake." *Id.* at 526.

**Note:** Defendants who sexually penetrate or contact a sleeping victim may be charged under the CSC Act's "physically helpless" provisions, as defined in MCL 750.520a(j). Defendants who sexually penetrate or contact an unconscious

\*See also Sections 2.5(I)(1) and 2.5(T) on how a "position of authority" may constitute "force or coercion."

\*The CSC IV statute contains substantially similar language. See MCL 750.520e(1)(b) and Section 2.3(B).

victim may be charged under the Act's "physically helpless" or "mentally incapacitated" provisions, as defined in MCL 750.520a(j) and MCL 750.520a(h), respectively. For more information on "physically helpless," see Section 2.5(S). For more information on "mentally incapacitated," see Section 2.5(P).

Michigan appellate courts have found "coercion" under the foregoing "force or coercion" provision when the defendant's actions create a "reasonable fear of dangerous consequences." In *People v McGill*, 131 Mich App 465 (1984), the defendant drove a 13-year-old girl to a far-away state park. While alone with her in the front seat, he placed his hand on her leg, on the inside of her underpants, on her breast underneath her underclothes, and up the back of her shirt. Defendant also promised her a modeling career, a home, and a trip to Arizona. Defendant was convicted of CSC IV (force or coercion), and of being a habitual offender. On appeal, he claimed insufficiency of the evidence to support either "force" or "coercion." The Court of Appeals disagreed, specifically on "coercion," concluding in light of the totality of the circumstances that defendant's actions created a "reasonable fear of dangerous consequences" that, to a trier of fact, could constitute "coercion":

"[W]hile defendant did not use actual violence or verbally threaten the complainant with violence, we believe that there was sufficient evidence of coercion to enable the jury to convict defendant of [CSC IV]. . . . He repeatedly and intimately touched the complainant despite her continued requests and orders to defendant to remove his hands from her. The complainant was only 13 years old. Defendant was an older and presumably stronger man. Defendant took the complainant to a state park far from her home. Complainant knew no one who lived nearby and testified that she was frightened. Given the totality of these circumstances, it could certainly be inferred that a coercive atmosphere existed and that defendant knew, or should have known, that his actions were coercive . . . ." *Id.* at 474.

The Court in *McGill* provided a cautionary case-by-case instruction:

"We do not hold here that the type of actual conduct described in the instant case will always satisfy the 'force or coercion' element. Were the victim older or had the undesired touching occurred in a place from which the victim could easily leave or from which she could summon help, a fear of dangerous consequences might not be deemed reasonable and an atmosphere of coercion might not exist. Each case must be examined on its own facts to determine whether force or coercion is indeed present." *Id.* at 474-475.

Blocking a victim's walking path can create a "reasonable fear of dangerous consequences." In *Cowley, supra*, a 17-year-old girl was walking down a street when the defendant approached her and asked for directions to a particular road. The victim continued walking, not knowing the road's location. The defendant stepped in front of her and blocked her path; the victim stepped backwards. The defendant grabbed her breast, stating "Oh, that feels nice." The victim ran screaming to the other side of the road. The Court

of Appeals reversed the circuit court's quashing of the information and dismissal of the CSC IV charge, holding as follows:

"In this case, defendant's blocking the victim's path while putting her in fear could constitute the element of force and coercion because the victim's fear was arguably a reasonable fear of dangerous consequences. [the CSC IV statute's definition of 'force or coercion'] provides that the force or coercion is not limited to examples included in the statute. Defendant's action here, differing from that of the defendant in *People v Patterson*, is sufficient to establish the necessary element." *Cowley, supra* at 81-82.

See also *People v Kline*, 197 Mich App 165, 166-167 (1992), where the Court of Appeals, relying on *McGill, supra*, found "force or coercion" present when the defendant grabbed his 16-year-old stepdaughter's breasts, removed her panties, told her not to tell her mother, then sexually penetrated her—all despite never threatening her, and only having isolated her from help on one of the sexual penetrations. *Kline* also held that a victim's mental capacity was relevant to a determination of "force or coercion" under the totality of the circumstances. *Id.* at 168.

In *People v Jansson*, 116 Mich App 674, 678-679, 684-685 (1982), the Court of Appeals found no abuse of discretion by the magistrate in finding "force or coercion" in a case in which defendant brought the victim alone to his place of employment and raped her in an office. In the office, defendant told the victim he wanted somebody "to fuck." After the victim responded that she did not "do things like that," the defendant turned off the lights, pulled her to the floor, removed her clothing, and raped her. The victim was "frightened and panicked and did not know what action to take." She testified that defendant forced her to engage in sexual intercourse, and that it was done against her will.

In *People v Makela*, 147 Mich App 674, 681-682 (1985), the Court of Appeals found no abuse of discretion by the magistrate in finding "force or coercion." This case involved a 16-year-old victim who was brought alone by defendant, who was "22 or 23 years old," to a motel room, where he pulled her down on the bed, got on top of her, removed her blue jeans and panties, and then raped her. The victim cried during the incident and told defendant she did not want "to do it." Besides saying this, the victim was "too scared to say anything" or to get away. No threats were ever issued by the defendant.

See also *People v Brown*, 197 Mich App 448, 450-451 (1992), in which the Court of Appeals, following *Jansson* and *Makela*, found sufficient evidence of "force or coercion" where defendant gave money to a man who brought the victim to a house in which the defendant later had sex with her. Defendant initially found the victim in a bedroom "alone, naked, and crying." The victim said she wanted to go home, did not want to be there, and did not want to have sexual intercourse. The Court of Appeals held that "[defendant] forced himself upon her in a situation where her lack of consent and physical helplessness were clear." *Id.*

## J. “Intimate Parts”

The term “intimate parts” applies only to sexual “contact” offenses, and not “penetration” offenses. The statutes governing CSC II, CSC IV, and Assault with Intent to Commit CSC II all involve “sexual contact,” which by definition involves “intimate parts” or the clothing covering those “intimate parts.” MCL 750.520a(c) defines “intimate parts” as follows:

“‘Intimate parts’ includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.”

MCL 750.520a(l) defines “sexual contact”<sup>\*</sup> as follows:

“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s *intimate parts* or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

- “(i) Revenge.
- “(ii) To inflict humiliation.
- “(iii) Out of anger.” [Emphasis added.]

It is clear from MCL 750.520a(l) that the sexual contact may involve either the defendant’s or the victim’s intimate parts. While the prosecution must prove that a defendant intended to touch the intimate part, it need not prove that defendant, in fact, sought sexual arousal or gratification, etc. Instead, the prosecution need only prove that the touching can “reasonably be construed as being for the purpose of sexual arousal or gratification,” etc. See *People v Fisher*, 77 Mich App 6, 13 (1977); and Section 2.5(U).

Michigan appellate courts have scrutinized the exact locations of the sexual contact. When the sexual contact is not precisely on an “intimate part,” some courts find only an “attempted” CSC contact offense instead of the completed CSC II or IV offense.\*

In *People v Leo*, 188 Mich App 417, 424 (1991), the defendant was convicted of attempted CSC II and acquitted of two counts of CSC II. On his attempted CSC II conviction, the facts adduced at trial showed that defendant, a fifth-grade teacher, stood behind one of his female students during class, and “put his hand under her blouse, down her bra strap, and inside her bra ‘near the beginning of the cup.’” While the Court of Appeals reversed defendant’s conviction based on improper prosecutorial rebuttal evidence, they said this about his “attempt” conviction: “Here, the . . . complainant testified that defendant may have only touched her just above her breast, at the top of her bra cup, before she pulled away and left. Accordingly, the evidence supported an instruction on attempt.” *Id.*

<sup>\*</sup>See Section 2.5(V).

<sup>\*</sup>A charge of Assault with Intent to Commit CSC may also be appropriate in some cases. To understand the difference between the CSC “assault” offenses and “attempt” offenses, see Section 2.4.

\*For more information on the voluntary abandonment defense, see Section 4.3.

In *People v McNeal*, 152 Mich App 404, 409 (1986), the defendant kidnapped a 16-year-old girl on the way to a bus stop and brought her to a house. Once inside the house, the defendant threw her on a couch and began “kissing her on the lips and neck. He then rubbed her on the top part of her thighs and on the side of her stomach, but nowhere else.” After doing this, the defendant walked the victim back to the bus stop, said he was sorry, then let her go. The defendant was convicted of kidnapping and attempted CSC II. On appeal of his attempted CSC II conviction, the defendant argued insufficiency of the evidence and voluntary abandonment. In rejecting defendant’s insufficiency argument, the Court of Appeals stated “Because defendant never touched the victim’s intimate parts, he could not have been convicted of the completed crime of second-degree criminal sexual conduct . . . . However, his actions obviously went beyond mere preparation and planning. His actions constituted direct movement toward the commission of the crime after preparations were made.” *Id.* at 414. The Court also rejected defendant’s voluntary abandonment argument, finding the abandonment was involuntary: “[W]e hold that a victim’s entreaties or pleadings may constitute ‘unanticipated difficulties’ or ‘unexpected resistance’. . . . Thus, the factfinder could conclude that the abandonment was not voluntary.”\* *Id.* at 416-417.

In *People v Davenport*, 402 Mich 820 (1977), the Michigan Supreme Court, by Order in lieu of leave to appeal, held that an inculpatory inference may be drawn by the defendant’s rubbing of his finger between a young girl’s legs. The defendant in *Davenport* was convicted by guilty plea of CSC II (under 13 years of age). During his guilty plea hearing, he admitted he had taken his finger and “rubbed it between her legs,” referring to the seven-year-old female victim. *People v Davenport*, 75 Mich App 46, 48 (1977). The Court of Appeals reversed defendant’s conviction, stating: “Under the [Criminal Sexual Conduct] Act, intimate parts do not include the legs of a human being; hence sexual contact, as statutorily defined, did not occur.” *Id.* at 49. However, the Michigan Supreme Court reversed the Court of Appeals and reinstated the defendant’s CSC II conviction, holding that “a factual basis is sufficient if an inculpatory inference can reasonably be drawn by a jury from the facts admitted by a defendant. . . . Defendant did supply sufficient evidence of sexual criminal misconduct to justify affirmance of his plea conviction.” *Davenport, supra*, 402 Mich at 820.

## K. “Member of the Same Household”

This phrase refers to the living arrangement between a victim and perpetrator. CSC I and II prohibit sexual penetration or contact in the following circumstance:

- F When the victim is at least 13 but less than 16 years of age and is a “member of the same household” as the perpetrator.\* MCL 750.520b(1)(b)(i) (CSC I—Penetration); and MCL 750.520c(1)(b)(i) (CSC II—Contact).

\*See Section 2.5(B).



The CSC Act does not define “member of the same household.” However, in *People v Garrison*, 128 Mich App 640 (1983), the Court of Appeals considered and gave meaning to this phrase in the context of the CSC Act, finding that to be deemed a “household” member, the facts must establish more than a “brief or chance visit.” In *Garrison*, the defendant appealed his CSC I conviction, arguing that the victim, his 13-year-old stepdaughter, should not be deemed a “member of the same household” because she only had “visitation” with the defendant and her mother during the summer months, pursuant to a custody order. (During the school year, the victim lived with her father and stepmother.) The Court of Appeals disagreed. It held that the length of residency, as long as it is under one roof and is more than a brief or chance visit, is not as important as other factors, like being part of a “family unit”:<sup>\*</sup>

“We believe the term ‘household’ has a fixed meaning in our society not readily susceptible of different interpretation. The length of residency or the permanency of residence has little to do with the meaning of the word as it is used in the statute. Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit. The ‘same household’ provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure. We conclude that, based on the facts in this case, the statutory term properly embraces the victim herein.” *Id.* at 646-647.

In *People v Phillips*, 251 Mich App 100 (2002), the Court of Appeals re-examined its analysis in *Garrison* and held that no proof of a “coercive authority figure” or a “subordinating relationship” is required to establish the CSC Act’s “household” element. In *Phillips*, the defendant was found in a compromising position by the police in the backseat of a car with the victim, a 14-year-old female. According to the defendant, the victim had been living in his home, along with his wife, for four to four-and-a-half months, and he and his wife were planning on adopting the victim. The victim, in contrast, claimed that she had spent the night at defendant’s house and that defendant wanted to adopt her. Defendant was convicted of CSC I and II. Afterward, the trial court denied his motion for directed verdict. On appeal, he claimed insufficiency of the evidence to support his CSC I conviction on the “household” element. Relying on *Garrison*, defendant specifically argued that there was no evidence of either a “subordinating relationship” or that he was a “coercive authority figure.” The Court of Appeals held that, under the CSC I statute,<sup>\*</sup> no proof of either phrase is needed to prove the “household” element, since the two phrases are not elements of the CSC I offense. In coming to this conclusion, and in finding that the trial court did not err in denying defendant’s motion for directed verdict, the Court of Appeals re-examined its holding in *Garrison*:

“[A] close examination of the statement in *Garrison* dispels any notion that this Court meant to impose such a requirement. As defendant points out, the *Garrison* Court explained that ‘[t]he “same household” provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a

<sup>\*</sup>However, see *People v Phillips*, discussed *infra*, which distinguished *Garrison*.

<sup>\*</sup>The analysis and holding in *Phillips* applies equally to the CSC II statute, since that statute contains the same language concerning “household.” *Id.* at 105 n 2.

member of his or her family or with a coercive authority figure.’ . . . According to *Random House Webster’s College Dictionary* (2nd ed, 1997), ‘assume’ means ‘to take for granted or without proof.’ Applying this meaning to the quote from *Garrison*, we conclude that this Court meant to indicate that proof of a ‘coercive authority figure’ was not necessary precisely because the ‘household’ requirement assumes such a link between the victim and the defendant by virtue of ‘the fact that people in the same household, those living together, bear a special relationship to one another.’ . . . Moreover, the first-degree criminal sexual conduct statute does not, by its plain language, require such proof. . . . Indeed, proof of coercion by an authority figure is an entirely separate manner by which to prove that a defendant committed first-degree criminal sexual conduct. . . . Therefore, accepting defendant’s argument would add an entirely new element to the statute while simultaneously compressing two distinct theories of first-degree criminal sexual conduct into one crime. Hence we find defendant’s argument without merit.” *Phillips, supra* at 104-105. [Emphasis in original.]

The *Phillips* Court also noted that the case did not involve a “brief or chance visit” by the victim to the defendant’s home, since the facts established more than a “visit” to defendant’s home. *Id.* at 103.

#### L. “Mental Health Professional”

MCL 750.520a(d) defines “mental health professional” as follows:

“‘Mental health professional’ means that term as defined in section 100b of the mental health code, 1974 PA 258, MCL 330.1100b.”

MCL 330.1100b(14) defines “mental health professional” as follows:

“‘Mental health professional’ means an individual who is trained and experienced in the area of mental illness or developmental disabilities and who is 1 of the following:

“(a) A physician who is licensed to practice medicine or osteopathic medicine and surgery in this state under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws.

**Note:** For a definition of “practice of medicine” see MCL 333.17001(1)(d). In *People v Rogers*, 249 Mich App 77, 105-106 (2001), the Court of Appeals held that this definition was not facially overbroad or vague.

“(b) A psychologist licensed to practice in this state under article 15 of the public health code, Act No. 368 of the Public Acts of 1978.

“(c) A registered professional nurse licensed to practice in this state under article 15 of the public health code, Act No. 368 of the Public Acts of 1978.

“(d) A certified social worker, a social worker, or a social worker technician registered in this state under article 16 of the occupational code, Act No. 299 of the Public Acts of 1980,

being sections 339.1601 to 339.1610 of the Michigan Compiled Laws.

“(e) A licensed professional counselor licensed to practice in this state under article 15 of the public health code, Act No. 368 of the Public Acts of 1978.

“(f) A marriage and family therapist licensed under article 15 of the occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.1501 to 339.1511 of the Michigan Compiled Laws.”

CSC IV prohibits a “mental health professional” from engaging in the sexual contact of another person when:

“The actor is a mental health professional and the sexual contact occurs during or within 2 years after the period in which the victim is his or her client or patient and not his or her spouse. The consent of the victim is not a defense to a prosecution under this subdivision. This does not indicate that the victim is mentally incompetent.” MCL 750.520e(1)(e).

## M. “Mental Illness”

MCL 750.520a(e) defines “mental illness” as follows:

“‘Mental illness’ means a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.”

A substantially similar definition of “mental illness” is contained in the Mental Health Code, MCL 330.1400(g), for use in determining whether an individual is a “person requiring treatment” under the involuntary commitment proceedings of MCL 330.1400 et seq., and also for use in criminal cases to determine whether an individual is legally insane under MCL 768.21a. Because the definitions contained in the Mental Health Code and the CSC Act are substantially similar, appellate case opinions construing the definition of “mental illness” under the Mental Health Code can be analogized to the CSC Act.

**Note:** The criminal insanity statute cited above refers to a repealed statute, MCL 330.1400a, for the definition of “mental illness.” However, the definition of “mental illness” cited above in MCL 330.1400(g), should be used for purposes of the insanity statute. *People v Mette*, 243 Mich App 318, 325 (2000).

In the CSC Act, the term “mental illness” is important because it is a component of the statutory circumstance of being a “mentally disabled” person. “Mentally disabled”<sup>\*</sup> is defined under MCL 750.520a(f) as follows:

“‘Mentally disabled’ means that a person has a *mental illness*, is mentally retarded, or has a developmental disability.” [Emphasis added.]

<sup>\*</sup>See Section 2.5(N).

Although the term “mental illness” is not expressly contained within the substantive CSC offenses, it is still a crime to sexually penetrate or contact a person with a “mental illness” because it is a crime to commit such acts against a “mentally disabled” person. CSC I and II prohibit the sexual penetration of, or contact with, a person who is “mentally disabled” in the following circumstances:

\*See Section 2.5(E).

F When the perpetrator is related to the victim by blood or affinity to the fourth degree.\* MCL 750.520b(1)(h)(i) (CSC I—Penetration); and MCL 750.520c(1)(h)(i) (CSC II—Contact).

\*See Section 2.5(T).

F When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit.\* MCL 750.520b(1)(h)(ii) (CSC I—Penetration); and MCL 750.520c(1)(h)(ii) (CSC II—Contact).

The foregoing statutory provisions contain no language limiting a defendant’s liability to situations in which he or she “knows or has reason to know” of the victim’s mental condition. The absence of this language suggests that a defendant’s knowledge of the victim’s mental condition is irrelevant. Thus, the CSC Act appears to impose criminal liability under the foregoing provisions regardless of whether the perpetrator knew or had reason to know about the victim’s mental disability. For more discussion on “mentally disabled,” see the next subsection. For a chart on the CSC Act’s mental elements, see Section 2.7.

## N. “Mentally Disabled”

MCL 750.520a(f) defines “mentally disabled” as follows:

\*See Sections 2.5(M), 2.5(Q), and 2.5(H), respectively.

“‘Mentally disabled’ means that a person has a mental illness, is mentally retarded, or has a developmental disability.”\*

CSC I and II prohibit the sexual penetration of, or contact with, a person who is “mentally disabled” in the following circumstances:

\*See Section 2.5(E).

F When the perpetrator is related to the victim by blood or affinity to the fourth degree.\* MCL 750.520b(1)(h)(i) (CSC I—Penetration); and MCL 750.520c(1)(h)(i) (CSC II—Contact).

\*See Section 2.5(T).

F When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit.\* MCL 750.520b(1)(h)(ii) (CSC I—Penetration); and MCL 750.520c(1)(h)(ii) (CSC II—Contact).

The foregoing statutory provisions contain no language limiting a defendant’s liability to situations in which he or she “knows or has reason to know” of the victim’s mental condition. The absence of this language suggests that a defendant’s knowledge of the victim’s mental condition is irrelevant. Thus, the CSC Act appears to impose criminal liability under the foregoing provisions regardless of whether the perpetrator knew or had reason to know

about the victim's mental disability. For a chart on the CSC Act's mental elements, see Section 2.7.

**Note:** Michigan appellate courts, if called upon, may impute a “knows or has reason to know” requirement into the foregoing statutes. They have previously imputed other requirements into the CSC Act, such as a “force or coercion” requirement in CSC offenses involving the “commission of a felony” and being “armed with a weapon” when no explicit reference to such a requirement is made in the statutes.\* However, appellate courts may decline to impute such a knowledge requirement because “[i]f the language used [in the statute] is clear, the Legislature must have intended the meaning it has plainly expressed, and the statute must be enforced as written.” *People v Valentin*, 457 Mich 1, 5 (1998). Additionally, the Legislature may have deliberately intended to omit a knowledge requirement because perpetrators are more likely to know of a victim's mental condition when they are related by blood or affinity or in a position of authority over the victim. For further discussion of this issue, see Saltzman, *Michigan Criminal Law* (2d ed), §5-6(c), p 409-410.

\*See *People v Hearn*, 100 Mich App 749 (1980); and *People v Thompson*, 117 Mich App 522 (1982). See also Sections 2.5(G) and 2.5(D).

## O. “Mentally Incapable”

MCL 750.520a(g) defines “mentally incapable” as follows:

“‘Mentally incapable’ means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.”

The sexual penetration or contact of a “mentally incapable” person is prohibited in each of the statutes governing CSC I-IV. CSC I and II prohibit sexual penetration or contact in the following circumstances:

- F When the perpetrator is aided and abetted by one or more other persons, and the perpetrator knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(d)(i) (CSC I—Penetration); and MCL 750.520c(1)(d)(i) (CSC II—Contact).
- F When the perpetrator causes personal injury to the victim and knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(g) (CSC I—Penetration); and MCL 750.520c(1)(g) (CSC II—Contact).
- F When the perpetrator is related to the victim by blood or affinity to the fourth degree and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(h)(i) (CSC I—Penetration); and MCL 750.520c(1)(h)(i) (CSC II—Contact). The perpetrator's knowledge of the victim's mental condition appears to be irrelevant in these offenses.
- F When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(h)(ii) (CSC I—Penetration); and MCL 750.520c(1)(h)(ii) (CSC II—Contact). The perpetrator's

\*See Sections 2.5(C), 2.5(P), and 2.5(S), respectively.

\*See Sections 2.5(R), 2.5(P), and 2.5(S), respectively.

\*See Sections 2.5(E), 2.5(N), 2.5(P), and 2.5(S), respectively.

\*See Sections 2.5(T), 2.5(N), 2.5(P), and 2.5(S), respectively.

knowledge of the victim's mental condition appears to be irrelevant in these offenses.

CSC III and IV prohibit sexual penetration or contact in the following circumstance:

- F When the perpetrator knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520d(1)(c) (CSC III); and MCL 750.520e(1)(c) (CSC IV).

\*See Sections 2.5(P) and 2.5(S), respectively.

\*This statute is now MCL 750.520a(g). See 2000 PA 505, effective March 28, 2001.

The Court of Appeals in *People v Breck*, 230 Mich App 450 (1998), in a case of first impression, construed the definition of “mentally incapable” in MCL 750.520a(f),\* and the requirement that a victim be “incapable of appraising the nature of his or her conduct.” The defendant in *Breck* was convicted of CSC III under MCL 750.520d(1)(c), for repeatedly engaging in anal intercourse with another male whom he knew to be mentally incapable. While the victim understood the physical nature of what the defendant did to him, he could not appreciate the moral consequences of his actions. Nor could he protest or stop defendant's acts because he had a severely diminished intellectual capacity. On appeal, defendant argued that the prosecutor had not proved the victim was incapable of “appraising the nature of his conduct” because the victim knew what the defendant was going to do to him each time they were alone. Defendant believed this phrase should be limited to victims who do not understand the *physical nature* of the conduct. The Court of Appeals declined to limit the contested phrase to just “physical” conduct or acts, and affirmed defendant's conviction. In adopting the reasoning in *People v Easley*, 42 NY2d 50, 56-57; 396 NYS2d 635; 364 NE2d 1328 (1977), the Court of Appeals stated:

“We . . . hold that the statutory language in question is meant to encompass not only an understanding of the physical act but also an appreciation of the nonphysical factors, including the moral quality of the act, that accompany such an act. . . . [I]t is clear to us that the victim was unable to appraise the nature of the sexual activity in this case as either morally right or wrong. Nor did the victim understand that others could not engage in sexual activity with him without his consent. Thus, contrary to defendant's claim . . . the victim suffered from a mental disease or defect that rendered him incapable of appraising the nature of his conduct.” *Breck, supra* at 455-456.

A trier of fact must employ an objective “reasonable person” standard in determining whether the defendant knew or had reason to know the victim was mentally incapable, mentally incapacitated, or physically helpless. *People v Baker*, 157 Mich App 613, 615 (1986). A defendant's subjective perception is irrelevant. *Id.* Accordingly, a defendant is criminally responsible when a “reasonable person” knows or has reason to know that the victim was mentally incapable, mentally incapacitated, or physically helpless at the time of the sexual act, regardless of the defendant's subjective perception. In *People v Davis*, 102 Mich App 403, 407 (1980), another panel of the Court of

Appeals interpreted the “knows or has reason to know” language and stated as follows:

“We are convinced that the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons.”

Intoxication is not a defense to the “knows or has reason to know” provisions of the statute because there is no “specific intent” or “real knowledge” requirement. *Id.* at 407-408.

A person under hypnosis may be deemed mentally incapable, mentally incapacitated, or physically helpless. *People v Sorscher*, 151 Mich App 122, 133 (1986). On the other hand, being under hypnosis does not preclude a finding of “force or coercion.” *Id.*

## P. “Mentally Incapacitated”

MCL 750.520a(h) defines “mentally incapacitated” as follows:

“‘Mentally incapacitated’ means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.”

The sexual penetration of, or contact with, a “mentally incapacitated” person is prohibited in each of the four degrees of the CSC Act. CSC I and II prohibit sexual penetration and contact in the following circumstances:

- F When the perpetrator is aided and abetted by one or more other persons, and the perpetrator knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(d)(i) (CSC I—Penetration); and MCL 750.520c(1)(d)(i) (CSC II—Contact).
- F When the perpetrator causes personal injury to the victim and knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(g) (CSC I—Penetration); and MCL 750.520c(1)(g) (CSC II—Contact).
- F When the perpetrator is related to the victim by blood or affinity to the fourth degree and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(h)(i) (CSC I—Penetration); and MCL 750.520c(1)(h)(i) (CSC II—Contact). The perpetrator’s knowledge of the victim’s mental condition appears to be irrelevant in these offenses.
- F When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(h)(ii) (CSC I—Penetration); and MCL 750.520c(1)(h)(ii) (CSC II—Contact). The perpetrator’s knowledge of the victim’s mental condition appears to be irrelevant in these offenses.

\*See Sections 2.5(C), 2.5(O), and 2.5(S), respectively.

\*See Sections 2.5(R), 2.5(O), and 2.5(S), respectively.

\*See Sections 2.5(E), 2.5(O), 2.5(N), and 2.5(S), respectively.

\*See Sections 2.5(T), 2.5(O), 2.5(N), and 2.5(S), respectively.

\*See Sections 2.5(O) and 2.5(S), respectively.

\*See MCL 750.520a(j), and Section 2.5(S).

CSC III and IV prohibit sexual penetration or contact in the following circumstance:

**F** When the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520d(1)(c) (CSC III); and MCL 750.520e(1)(c) (CSC IV).

Alcohol, narcotics, anesthetics, and other similar substances may render a victim temporarily incapable of appraising or controlling his or her conduct. When this happens, a victim may either be “mentally incapacitated” or “physically helpless”\* under the CSC Act. The difference between “mentally incapacitated” and “physically helpless” lies in the voluntariness of the ingestion or administration of the substances, and the length of time for which the victim is incapable of appraising and controlling his or her conduct. “Mentally incapacitated” requires an unconsented ingestion and a temporary incapacity in appraising or controlling his or her conduct. Neither of these requirements are contained within the definition of “physically helpless.”

A trier of fact must employ an objective “reasonable person” standard in determining whether the defendant knew or had reason to know the victim was mentally incapable, mentally incapacitated, or physically helpless. *People v Baker*, 157 Mich App 613, 615 (1986). A defendant’s subjective perception is irrelevant. *Id.* Accordingly, a defendant is criminally responsible when a “reasonable person” knows or has reason to know that the victim was mentally incapable, mentally incapacitated, or physically helpless at the time of the sexual act, regardless of the defendant’s subjective perception. In *People v Davis*, 102 Mich App 403, 407 (1980), another panel of the Court of Appeals interpreted the “knows or has reason to know” language and stated as follows:

“We are convinced that the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons.”

Intoxication is not a defense to the “knows or has reason to know” provisions of the statute because there is no “specific intent” or “real knowledge” requirement. *Id.* at 407-408.

A person under hypnosis may be deemed mentally incapable, mentally incapacitated, or physically helpless. *People v Sorscher*, 151 Mich App 122, 133 (1986). On the other hand, being under hypnosis does not preclude a finding of “force or coercion.” *Id.*

## Q. “Mentally Retarded”

MCL 750.520a(i) defines “mentally retarded” as follows:

“‘Mentally retarded’ means significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior.”



The term “mentally retarded” is contained within the definition of “mentally disabled”<sup>\*</sup> under MCL 750.520a(f):

“‘Mentally disabled’ means that a person has a mental illness, is *mentally retarded*, or has a developmental disability.” [Emphasis added.]

Although the term “mentally retarded” is not expressly contained within the substantive CSC offenses, it is still a crime to sexually penetrate or contact a person who is “mentally retarded” because it is a crime to commit such acts against a “mentally disabled”<sup>\*</sup> person. CSC I and II prohibit the sexual penetration of, or contact with, a person who is “mentally disabled” in the following circumstances:

- F When the perpetrator is related to the victim by blood or affinity to the fourth degree.<sup>\*</sup> MCL 750.520b(1)(h)(i) (CSC I—Penetration); and MCL 750.520c(1)(h)(i) (CSC II—Contact). The perpetrator’s knowledge of the victim’s mental condition appears to be irrelevant in these offenses.
- F When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit.<sup>\*</sup> MCL 750.520b(1)(h)(ii) (CSC I—Penetration); and MCL 750.520c(1)(h)(ii) (CSC II—Contact). The perpetrator’s knowledge of the victim’s mental condition appears to be irrelevant in these offenses.

## R. “Personal Injury”

Although all sexual violence involves some injury to the victim, the CSC Act imposes more serious penalties when the perpetrator engages in sexual penetration or contact and causes specifically defined “personal injury” under the following circumstances:

- F When the perpetrator uses force or coercion.<sup>\*</sup> MCL 750.520b(1)(f) (CSC I—Penetration); and MCL 750.520c(1)(f) (CSC II—Contact). “Force or coercion” is defined under MCL 750.520b(1)(f)(i) to (v).
- F When the perpetrator knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.<sup>\*</sup> MCL 750.520b(1)(g) (CSC I—Penetration); and MCL 750.520c(1)(g) (CSC II—Contact).

MCL 750.520a(k), defines “personal injury” as follows:

“‘Personal injury’ means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.”<sup>\*</sup>

“Personal injury” includes both bodily injury and mental anguish. *People v Himmelein*, 177 Mich App 365, 376 (1989). A victim’s “personal injury” need not be permanent or substantial. *People v Kraai*, 92 Mich App 398, 403 (1979).

<sup>\*</sup>See Section 2.5(N).

<sup>\*</sup>See Section 2.5(N).

<sup>\*</sup>See Section 2.5(E).

<sup>\*</sup>See Section 2.5(T).

<sup>\*</sup>See Section 2.5(I).

<sup>\*</sup>See Sections 2.5(O), 2.5(P), and 2.5(S), respectively.

<sup>\*</sup>See also CJI2d 20.9 (Personal Injury—Force or Coercion).

## 1. “Bodily Injury”

The following cases upheld the listed “bodily injuries” as satisfying the “personal injury” element of the CSC Act”:

- F *People v Mackle*, 241 Mich App 583, 598-600 (2000) (strangling with a necktie, repeatedly striking with open-hand slaps, punching in the leg, binding by hands so tightly fingers go numb).
- F *People v Woods*, 204 Mich App 472, 474 (1994) (“pregnancy”).
- F *People v Himmelein*, 177 Mich App 365, 377 (1989) (“bruises, welts, or other marks to her hands, wrists, shoulder, groin and buttocks”).
- F *People v Swinford*, 150 Mich App 507, 512 (1986) (“choking” with visible handprints, “muscle spasms” in neck, “swollen and torn” vaginal areas).
- F *People v Jenkins*, 121 Mich App 195, 198 (1982) (“pain” in the spine, “scratches” on the chin, a “small bruise” on the lower back, “internal pain which lasted for three to four days after the incident,” “trouble sitting for two weeks after the incident”).
- F *People v Kiczenski*, 118 Mich App 341, 345 (1982) (“scratches” on the back of leg, buttocks, knee, and arm; “abrasions” on the knee and elbow; and pain in back).
- F *People v Reese*, 114 Mich App 644, 646 (1982) (“sore” and “very scared” after fighting off defendant).
- F *People v Gwinn*, 111 Mich App 223, 239 (1981) (“scratches on back,” “bruises on nose,” “tenderness in her perineal area, particularly around the anus”).
- F *People v Hollis*, 96 Mich App 333, 337 (1980) (bruises).
- F *People v Kraai*, 92 Mich App 398, 402-403 (1979) (“bloody nose, a slap in the face, a punch to the stomach, strangulation until [the victim] lost consciousness”).
- F *People v Thompson*, 76 Mich App 705, 710 (1977) (“bruises, scars and swelling of skin tissue”).

## 2. “Mental Anguish”

The Michigan Supreme Court, in *People v Petrella*, 424 Mich 221 (1985), defined “mental anguish” as follows:

“[E]xtreme or excruciating pain, distress, or suffering of the mind.” *Id.* at 227.

The Court also held that “mental anguish” is not limited to “mental suffering which occurs at the time of the assault.” *Id.* at 277.

CJI2d 20.9(2) was revised to reflect *Petrella*’s definition of “mental anguish”:

“Mental anguish” means extreme pain, extreme distress, or extreme suffering, either at the time of the event or later as a result of it.”

**Note:** The definition of “mental anguish” in CJI2d 20.9(2) is not identical to *Petrella*’s definition. *Petrella*’s definition contains the adjective “excruciating” as an alternative to “extreme.” Additionally, the adjective “extreme” is listed three times in CJI2d 20.9(2), but only once in *Petrella*. The time requirements of CJI2d 20.9(2)—“either at the time of the event or later as a result of it”—are in accord with *Petrella*. *Petrella*, *supra* at 276-277.

The following is a non-exhaustive list of factors provided by the Supreme Court in *Petrella* to consider when determining whether a victim has suffered mental anguish. The Supreme Court stressed that each case must be decided on its own facts and that “no single factor listed below should be seen as necessary to a finding of mental anguish.” *Id.* at 270. The factors are as follows:

- F Testimony that the victim was upset, crying, sobbing, or hysterical during or after the assault.
- F The need by the victim for psychiatric or psychological care or treatment.
- F Some interference with the victim’s ability to conduct a normal life, such as absence from the workplace.
- F Fear for the victim’s life or safety, or that of those near to her.
- F Feelings of anger and humiliation by the victim.
- F Evidence that the victim was prescribed some sort of medication to treat her anxiety, insomnia, or other symptoms.
- F Evidence that the emotional or psychological effects of the assault were long-lasting.
- F A lingering fear, anxiety, or apprehension about being in vulnerable situations in which the victim may be subject to another attack.
- F The fact that the assailant was the victim’s natural father. *Id.* at 270-271.

The Supreme Court in *Petrella*, even though it recognized that virtually all victims of sexual assault experience some degree of mental distress or trauma, declined to define “mental anguish” as requiring *more than* the emotional distress experienced by the “average” rape victim. The Court, after examining studies that showed no “normal” response to being raped, stated as follows:

“We see no need to construe the statute in this manner. Assuming, *arguendo*, that every victim of a forcible sexual assault suffers some mental anguish, the prosecution, in theory, would be free to charge either first-degree CSC or third-degree CSC on the basis of perpetration of a forcible sexual penetration where the victim suffers no other personal injury, and where none of the other aggravating circumstances are present. However, while virtually all rape victims may *in fact* suffer mental anguish, the prosecution is limited by the availability of probative, admissible, and credible *evidence* of such anguish. In order to support a conviction of first-degree CSC, based on the aggravating factor of mental anguish, the prosecution is required to produce evidence from which a rational trier of fact

could conclude, beyond a reasonable doubt, that the victim experienced extreme or excruciating pain, distress, or suffering of the mind.” *Id.* at 258-259. [Emphasis in original.]

Under this definition of “mental anguish,” the Michigan Supreme Court in *Petrella* held that the evidence supported a finding of mental anguish. In *Petrella*, after being raped in her apartment by the defendant, the victim was “very upset and crying” and “frightened” and “uncomfortable.” *Id.* at 230. She also experienced “insomnia” up to the time of trial, missed “three days of work immediately after the incident” (and periodically later on), and never again stayed at the same apartment. *Id.* at 271. Other witnesses testified the victim was “very agitated, very upset, and very, very nervous.” *Id.* The Supreme Court held as follows, finding it significant that the victim never again stayed in the same apartment:

“We agree with the prosecutor that, besides the evidence of crying, hysteria, fright, loss of sleep, and absence from the workplace, it is significant that the victim never stayed another night in the apartment in which she was raped. We conclude that a rational trier of fact could have found that the element of mental anguish was proven beyond a reasonable doubt.” *Id.* at 272.

However, in *People v Simpson*, 424 Mich 221 (1985), the companion case argued and decided with *Petrella*, the Supreme Court found insufficient evidence to establish “mental anguish.” After being raped by her natural father in a field, the victim in *Simpson* was “upset and screaming and crying,” and remained so after returning to her apartment, where she took an aspirin, showered, then went to bed. *Id.* at 233-234. The victim reported the rape about a week later. When asked about the delay in reporting the rape, the victim said she “never really gave it too much thought.” *Id.* at 272. Even though the Supreme Court discounted this last statement, finding any number of interpretations for it, the Court still found the evidence insufficient to amount to “mental anguish”:

“[W]e are unable to sustain the trial court’s finding that the victim suffered mental anguish. Aside from the testimony that the complainant was crying and upset, the only other factor relied upon by the lower courts was the inference that the emotional distress experienced by the victim must have been aggravated by the fact that defendant is the complainant’s natural father.” *Id.* at 274.

The Supreme Court discussed the evidentiary considerations needed to establish “mental anguish,” and it also discussed the factor involving a “natural parent”:

“The record must contain either direct evidence of intensified mental suffering, such as specific testimony on the point from the victim, or perhaps circumstantial evidence of such suffering, as an inference properly to be drawn from other facts in the record. While the trier of fact may draw reasonable inferences from facts of record, it may not indulge in inferences wholly unsupported by any evidence, based only on assumption. . . . We hold that the trial court’s inference that the familial relationship between defendant and the complainant contributed to the complainant’s emotional distress, so

as to constitute mental anguish as we have defined it today, is unsupported by the evidence of record.” *Id.* at 275.

In *People v Himmelein*, 177 Mich App 365 (1989), the Court of Appeals found “mental anguish” where, after taping the victim’s hands and eyes and placing the victim’s crying three-year-old daughter in a nearby closet, the defendant raped her. She was “terrified and frightened” and “crying” when found by her husband. Also, a physician testified that the victim was “tense and reserved to the point that it was difficult to talk to her.” *Id.* at 376. The victim would not stay at home by herself for several months following the incident. The Court of Appeals found this evidence, although not overwhelming, sufficient for the jury to conclude that mental anguish was proven beyond a reasonable doubt.

In *People v Swinford*, 150 Mich App 507 (1986), the Court of Appeals found “mental anguish” where the defendant grabbed the victim, choked her, threatened to kill her, and then raped her in the backseat of a car, causing her to regularly see a therapist and to experience marital problems. The victim was also fearful of working at night and gave up her night shift at work, which resulted in a substantial pay cut. The Court of Appeals, after reviewing the non-exhaustive list of factors enunciated in *Petrella*, upheld these “manifestations of emotional trauma” as sufficient to allow a rational trier of fact to find “mental anguish” beyond a reasonable doubt. *Swinford, supra* at 514.

In *People v Mackle*, 241 Mich App 583 (2000), the Court of Appeals sustained the following facts as “mental anguish” in a case where the defendant kidnapped the victim for a week and sexually penetrated her at least eight times in Michigan and “continuously” in Canada: threats to deliver the victim to the Mafia in New York (which she believed), defendant’s deriving amusement from overpowering her, conditioning her freedom (if not her life) on performing a sexual act, tying her up and strapping her to his vehicle, promising to release her if she behaved, and locking her in a small sauna for 15-20 minutes (on its highest setting), knowing she was claustrophobic. *Id.* at 598-600.

A stepparent relationship is a proper factor to consider when deciding whether a victim has suffered “mental anguish,” even though the list of non-exhaustive factors in *Petrella* contains only a reference to “natural” parent. In *People v Russell*, 182 Mich App 314 (1990), rev’d on other grounds 434 Mich 922 (1990), the defendant was convicted of CSC I for raping his two stepdaughters, who were aged 13 and 16. On appeal, he claimed it was error for the trial court to instruct the jury that it could consider the stepparent relationship as a factor in the *Petrella* list of non-exhaustive factors. The Court of Appeals disagreed. It said that one factor allowed by the *Petrella* court was the consideration of whether the defendant was the complainant’s father. In recognizing the Supreme Court’s rationale for allowing this consideration (that “greater mental anguish can be expected in such a situation

given the societal taboo on incest and loss of a healthy relationship with one's father"), the Court of Appeals held as follows:

"We believe that where the evidence showed defendant had been married to the complainant's mother for ten years, that complainants had lived in the same household with defendant for that period and that defendant was viewed as a father-figure, the trial court did not err in allowing the jury to consider the stepparent relationship as one factor in determining the presence of mental anguish." *Russell*, *supra* at 320-321.

### 3. Timing of "Personal Injury"

A perpetrator may inflict a "personal injury" at any point in a sexual assault. The timing of this personal injury, in relation to the sexual penetration or contact, can be important under the CSC Act, particularly in cases involving multiple penetrations or contacts. Early on, there was a split of authority on whether one injury may support multiple penetrations or contacts. In *People v Payne*, 90 Mich App 713, 718 (1979), the Court of Appeals held that a personal injury inflicted before the sexual assault would only support the personal injury element for the first sexual penetration, not subsequent ones. However, in *People v Hunt*, 170 Mich App 1 (1988), another panel of the Court of Appeals held that a personal injury inflicted immediately before a series of sexual penetrations was sufficient to support each subsequent penetration. This split of authority was finally resolved by *People v Martinez*, 190 Mich App 442 (1991), which followed the decision in *Hunt*, making *Payne* no longer binding precedent.\* However, a subsequent case, *People v Mackle*, 241 Mich App 583 (2000), chose to examine each sexual penetration for evidence of personal injury. Each case is discussed below.

In *Hunt*, *supra*, the Court of Appeals held that personal injuries inflicted "immediately prior to" a "series" of sexual penetrations may be used to support not only the initial penetration, but also all subsequent penetrations:

"The beating visited upon the complainant immediately prior to the series of sexual penetrations is sufficient to supply the element of personal injury with respect to each of the subsequent penetrations so as to support multiple convictions under [CSC I—force or coercion involving personal injury]. We fail to see any distinction between this beating and an ongoing criminal act such as the use of a deadly weapon during multiple penetrations or, for that matter, any other felony committed in close temporal proximity with the acts of penetration. The evidence in this case shows that the beating inflicted upon the plaintiff, which caused physical injury and was used by the defendant to force or coerce his accomplishment of multiple sexual penetrations, was part of a continuing series of sexual assaults. The physical injury is a common element for each of the assaults under these circumstances. There was never any indication of the defendant's intention to discontinue the attack during the entire episode." *Id.* at 8-9.

In *Martinez*, the Court of Appeals, following *Hunt*, *supra*, held that injuries inflicted "within ten minutes" of a sexual assault when there was "no

\*MCR 7.215(I) requires all panels of the Court of Appeals to follow the rule of law established in a published decision issued on or after November 1, 1990, except when it has been reversed or modified.

indication of the defendant's intention to discontinue the attack," were sufficient to support the personal injury element on a subsequent penetration:

"We agree with *Hunt*. Defendant also claims that *Hunt* is distinguishable because of the immediacy of the penetrations following the assault. We hold that the penetrations in this case occurred within ten minutes of the assault and there was no indication of the defendant's intention to discontinue the attack during the entire episode. Hence, there was sufficient evidence to support the personal injury element with respect to the count involving cunnilingus." *Martinez, supra* at 445.

In *Mackle*, the Court of Appeals dealt with a case in which the defendant kidnapped the victim for a week and sexually penetrated her at least eight times in Michigan and "continuously" in Canada, causing numerous bodily injuries and considerable mental anguish. Because the Court could not determine which injuries were attributable to the sexual penetrations in Michigan, it methodically examined the victim's testimony regarding each incident—although it was careful to point out, when examining one of the penetrations, "our reading of *Hunt* and *Martinez, supra*, indicates that we need not consider an act of penetration in isolation. . . ." *Mackle, supra* at 600. Unlike *Hunt* and *Martinez*, the Court did not establish exactly when the personal injuries occurred in relation to the sexual penetrations—except to generally say they occurred "before" or "after" the penetrations. The Court sustained the following "bodily injuries" as sufficient to satisfy the "personal injury" element of the CSC Act: strangling the victim with a necktie, binding her hands so tightly her fingers went numb, repeatedly striking her with open-hand slaps, and punching her leg. The Court sustained the following "mental anguish" as "personal injury": threats to deliver the victim to the Mafia in New York (which she believed), deriving amusement from overpowering her, conditioning her freedom (if not her life) on performing a sexual act, tying her up and strapping her to his vehicle, promising to release her if she behaved, and locking her in a small sauna for 15-20 minutes (on its highest setting), knowing she was claustrophobic. *Mackle, supra* at 598-600.

#### 4. "Causation" of "Personal Injury"

A defendant need not be the "sole cause" of the victim's "personal injury." In *People v Brown*, 197 Mich App 448 (1992), a case of first impression, the victim was kidnapped and raped by some men in a house; she was later raped by the defendant in the same house. However, the defendant denied knowing the victim was kidnapped and raped by the other men. He claimed he gave money to a man who brought her to the house, whereupon he found her "sitting in a bedroom, alone, naked, and crying." *Id.* at 450. The victim said she wanted to go home and did not want to have intercourse. Defendant raped her anyway, and was later convicted of CSC I (force or coercion involving personal injury). On appeal, defendant blamed the cause of the victim's personal injury on the other men who kidnapped and raped her. He claimed there was insufficient evidence showing that he caused the personal injury. The Court of Appeals held that defendant caused at least some of the personal

injury to the victim, and that a defendant need not be the sole cause of the entire injury:

“As pointed out by prosecution, the statute does not require that defendant be the sole cause of the victim’s injury. See MCL 750.520b(1)(f). Defendant does not dispute that the victim was upset and crying when he found her. She testified that she continued to cry during and after defendant’s assault, and her testimony concerning that assault was appallingly graphic. Viewing this evidence in the light most favorable to the prosecution, we conclude that defendant’s argument fails. There was sufficient evidence from which the jury could find beyond a reasonable doubt that defendant himself inflicted personal injury upon his victim. Although the amount may be undetermined or even arguably undeterminable, defendant was the cause of some part of the victim’s total injury. That is sufficient.” *Id.* at 452.

In addition to finding it sufficient that defendant caused at least part of the victim’s personal injury, the Court of Appeals explained that a defendant takes his victim as he finds him or her, and the personal injuries inflicted by the other perpetrators before defendant’s rape are not intervening or independent causes that exonerate defendant:

“In considering this matter, we observe that a defendant ‘takes his victim as he finds [her]’ and therefore any special susceptibility of the victim to the injury at issue does not constitute an independent ‘cause’ exonerating defendant. See *People v Webb*, 163 Mich App 462, 465; 415 NW2d 9 (1987) (foreseeable intervening events do not break chain of causation); see also *People v Flenon*, 42 Mich App 457, 459-462; 202 NW2d 471 (1972) (foreseeable ordinary negligence in medical treatment did not break chain of causation). In this case, defendant ‘found’ his victim distraught, upset, and crying. She continued in this state during and after defendant’s assault, stating that she did not want to have intercourse and wanted to go home.” *Id.* at 451-452.

## 5. Alternative Theories

The two types of personal injuries—bodily injury and mental anguish—are not alternative theories upon which a jury must make independent findings. In *People v Asevedo*, 217 Mich App 393 (1996), the Court of Appeals held as follows:

“[B]odily injury and mental anguish are not alternative theories upon which a jury is required to make independent findings, as proposed by defendant. When a statute lists alternative means of committing an offense which in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theory. [Citation omitted.] The same reasoning applies here. Because bodily injury, mental anguish, and the other conditions listed in MCL 750.520a(j); MSA 28.788(1)(j) are merely different ways of defining the single element of personal injury, we believe they should not be construed to represent alternative theories upon which jury unanimity is required. Accordingly, if the evidence of any one of the listed definitions is sufficient, then the element of personal injury has been proven.” *Id.* at 397



## S. “Physically Helpless”

MCL 750.520a(j) defines “physically helpless” as follows:

“‘Physically helpless’ means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.”

The sexual penetration of, or contact with, a “physically helpless” person is prohibited in each of the four degrees of the CSC Act. CSC I and II prohibit sexual penetration and contact in the following circumstances:

- F When the perpetrator is aided and abetted by one or more other persons, and the perpetrator knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(d)(i) (CSC I—Penetration); and MCL 750.520c(1)(d)(i) (CSC II—Contact).
- F When the perpetrator causes personal injury to the victim and knows or has reason to know the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(g) (CSC I—Penetration); and MCL 750.520c(1)(g) (CSC II—Contact).
- F When the perpetrator is related to the victim by blood or affinity to the fourth degree and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(h)(i) (CSC I—Penetration); and MCL 750.520c(1)(h)(i) (CSC II—Contact). The perpetrator’s knowledge of the victim’s mental condition appears to be irrelevant in these offenses.
- F When the perpetrator is in a position of authority over the victim and uses this authority to coerce the victim to submit and the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(h)(ii) (CSC I—Penetration); and MCL 750.520c(1)(h)(ii) (CSC II—Contact). The perpetrator’s knowledge of the victim’s mental condition appears to be irrelevant in these offenses.

\*See Sections 2.5(C), 2.5(O), and 2.5(P), respectively.

\*See Sections 2.5(R), 2.5(O), and 2.5(P), respectively.

\*See Sections 2.5(E), 2.5(O), 2.5(N), and 2.5(P), respectively.

\*See Sections 2.5(T), 2.5(O), 2.5(N), and 2.5(P), respectively.

CSC III and IV prohibit sexual penetration or contact in the following circumstance:

- F When the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.\* MCL 750.520d(1)(c) (CSC III); and MCL 750.520e(1)(c) (CSC IV).

\*See Sections 2.5(O) and 2.5(P), respectively.

A “physically helpless” person may be asleep, unconsciousness, or uncommunicative for a variety of reasons, including extreme fatigue, illness, disease, or the voluntary ingestion of alcohol, narcotics, and other similar substances. If a person falls asleep, loses consciousness, or becomes uncommunicative because of the ingestion or administration of any of these substances without his or her consent, the person is “mentally incapacitated”\* under the CSC Act. The difference between “physically helpless” and “mentally incapacitated” lies in the voluntariness of the ingestion and the length of time in which the victim is incapable of appraising and controlling

\*See MCL 750.520a(h) and Section 2.5(P).

his or her conduct. “Mentally incapacitated” requires an unconsented ingestion and a temporary incapacity in appraising or controlling his or her conduct. Neither of these requirements is contained within the definition of “physically helpless.”

The touchstone of being “physically helpless” is the inability to communicate unwillingness to an act. In *People v Perry*, 172 Mich App 609 (1988), the victim, who was initially asleep on the couch, was awakened by a burglar and brought to a bathroom where she was repeatedly raped. Following a jury trial, defendant was convicted of CSC I (physically helpless), armed robbery, breaking and entering an occupied dwelling with intent to commit CSC, and felony firearm. On appeal, he raised numerous issues, including insufficiency of the evidence that the victim was “physically helpless.” In reversing the defendant’s convictions and remanding for a new trial, the Court of Appeals wrote the following about the issue of the victim’s physical helplessness:

“We agree with defendant that the essence of physical helplessness is that the victim is unable to communicate unwillingness to an act. Such is the case when the victim is asleep or unconscious. Here, the victim was awake when the assault occurred and could physically communicate her unwillingness to the act. We note that a different result would follow if the victim had been penetrated by defendant while asleep or had awakened during that process. See, e.g., *People v Kusumoto*, 169 Cal App 3d 487; 215 Cal Rptr 347 (1985), discussed in *People v Patterson*, 428 Mich 502; 410 NW2d 733 (1987).” *Id.* at 622.

\*See Section 2.5(I).

A victim too scared and frightened to say anything, or to get away from her assailant, is not mentally incapable, mentally incapacitated, or physically helpless as a matter of law—although this does not preclude a finding of “force or coercion”<sup>\*</sup> against the assailant. In *People v Makela*, 147 Mich App 674 (1985), the defendant, after a party, took the 16-year-old victim to his parents’ motel room where he and the victim sat alone on a bed watching TV. The defendant put his arm around the victim, pulled her down on the bed, removed her blue jeans and panties, then raped her. At the preliminary examination, the victim testified that she cried during the incident and told defendant she did not want “to do it,” but she was “too scared to say anything” and too “frightened” to get away. *Id.* at 678-679. In upholding the circuit court’s writ of superintending control, which ordered the district court judge to bind the defendant over on CSC III instead of CSC IV, the Court of Appeals stated “[C]omplainant’s own testimony at the preliminary examination precludes as a matter of law any finding that she was mentally incapable, mentally incapacitated, or physically helpless as defined in MCL 750.520a.” *Id.* at 681. But the Court of Appeals did find sufficient evidence to sustain “force or coercion.” *Id.* at 682.

A trier of fact must employ an objective “reasonable person” standard in determining whether the defendant knew or had reason to know the victim was mentally incapable, mentally incapacitated, or physically helpless. *People v Baker*, 157 Mich App 613, 615 (1986). A defendant’s subjective perception is irrelevant. *Id.* Accordingly, a defendant is criminally responsible when a “reasonable person” knows or has reason to know that the victim was

mentally incapable, mentally incapacitated, or physically helpless at the time of the sexual act, regardless of the defendant's subjective perception. In *People v Davis*, 102 Mich App 403, 407 (1980), the Court of Appeals interpreted the "knows or has reason to know" language and stated as follows:

"We are convinced that the Legislature only intended to eliminate liability where the mental defect is not apparent to reasonable persons."

Intoxication is not a defense to the "knows or has reason to know" language of the statute because there is no "specific intent" or "real knowledge" requirement. *Id.* at 407-408.

A person under hypnosis may be deemed mentally incapable, mentally incapacitated, or physically helpless. *People v Sorscher*, 151 Mich App 122, 133 (1986). On the other hand, being under hypnosis does not preclude a finding of "force or coercion." *Id.*

## T. "Position of Authority"

The CSC Act contains provisions that prohibit a perpetrator from using a "position of authority" to coerce a victim to submit to sexual acts. Although the phrase is undefined in the CSC Act, the statutes governing CSC I and CSC II expressly prohibit a person from using a "position of authority" to coerce a victim to submit to sexual penetration or contact in the following circumstances:

- F When the victim is at least 13 but less than 16 years of age.\* MCL 750.520b(1)(b)(iii) (CSC I—Penetration); or MCL 750.520c(1)(b)(iii) (CSC II—Contact).
- F When the victim is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless.\* MCL 750.520b(1)(h)(ii) (CSC I—Penetration); or MCL 750.520c(1)(h)(ii) (CSC II—Contact).

\*See Section 2.5(B).

\*See Sections 2.5(O), 2.5(N), 2.5(P), and 2.5(S), respectively.

The following cases illustrate how courts have construed the "position of authority" circumstance under the CSC Act:

- F *People v Reid*, 233 Mich App 457 (1999):

The victim, a 15-year-old boy, was having problems in school. After hearing about these problems from the victim's father, the defendant offered to help by talking with the victim. Although not a professional counselor, the defendant was previously a counselor at a church. The victim's parents entrusted their son to the defendant for "informal" counseling on three or four occasions. On the last occasion, while alone at the defendant's parents' house, defendant plied the victim with Vodka-spiked 7-Up and showed him sexually provocative computer pictures. After some coaxing and removal of clothes, the defendant performed fellatio on the victim, and the victim performed fellatio on the defendant. The defendant was convicted of two counts of CSC I (position of authority

over victim at least 13 but less than 16). On appeal, he argued insufficiency of the evidence to support a conclusion that he was in a position of authority over the victim, or that he used this authority to coerce the victim to submit. The Court of Appeals disagreed. As an initial matter, the Court concluded that defendant was in a “position of authority” over the victim, and that the victim’s parents placed him in that position:

“[T]here was sufficient evidence to conclude that defendant was in a position of authority over the complainant at the time of the incidents. The complainant’s father testified that defendant told him that defendant had been a counselor at a church and would be willing to talk with the complainant about the complainant’s problems. Both of the complainant’s parents expressed an understanding that the complainant was spending time with defendant to counsel him. Also, according to the complainant’s testimony, defendant stated to the complainant, in front of the complainant’s father, that he was a counselor.

“From the foregoing, a rational jury could infer . . . that the complainant’s parents placed defendant in a position of authority over the complainant, particularly at times when they allowed the complainant to spend time with defendant outside their presence, and that the complainant was aware of this.” *Id.* at 467-468.

The Court also discussed the defendant’s lack of a formal title and the victim’s special vulnerability:

“[A] reasonable jury could have found that defendant exploited the special vulnerability attendant to his relationship with the complainant to abuse him sexually. While it is true that defendant in this case did not hold a formal position, such as being a school teacher, we find that inconclusive. There certainly was sufficient evidence to support a finding that defendant was placed in a substantially similar position of practical authority over the complainant.” *Id.* at 472.

Finally, after acknowledging that “[f]orce or coercion is not limited to physical violence but is instead determined in light of all the circumstances,” *Id.* at 468, quoting *People v Brown*, 197 Mich App 448, 450 (1992), the Court concluded that defendant used his informal counselor position to “coerce” the victim to submit to fellatio:

“[D]efendant used a position of authority over the complainant to engineer a quite elaborate series of events to place the complainant in a confused and disoriented condition and then took advantage of the complainant’s condition to perform fellatio on the complainant and to instruct successfully the complainant to perform fellatio on him. This is sufficient evidence for a rational factfinder to conclude that the complainant was ‘constrained by subjugation,’ . . . and, thus, coerced into submitting to these acts of sexual penetration by defendant through use of his position of authority over the complainant.” *Reid, supra* at 471.

F *People v Knapp*, 244 Mich App 361 (2001):

This case arose out of a “spiritual therapy” class, in which the defendant taught reiki—an ancient healing art involving various hand positions used to activate “internal healing powers.”\* Defendant was a master reiki teacher and practitioner with a master’s degree in counseling. He taught reiki classes at an independent home, first instructing the 14-year-old victim’s mother. Months later, after getting the mother’s permission, he began instructing the victim. While alone with the victim in a bedroom, the victim, at defendant’s request, felt defendant’s testicles and then put one hand on the defendant’s stomach and one hand on the defendant’s testicles—all while the defendant talked about sexual energy. On another private occasion later that day, the victim, again at defendant’s request, touched and manipulated the defendant’s testicles while the defendant talked about sexual energy and masturbated.

Defendant was convicted of CSC II (position of authority over a victim at least 13 but under 15 years old). On appeal, he claimed insufficiency of the evidence to support a finding of “position of authority” or that this authority was used to “coerce” the victim to submit. The Court of Appeals disagreed, first holding that defendant was in a “position of authority” over the victim:

“Defendant first gained the trust of complainant’s mother by acting as her therapist and reiki teacher. . . . As an outgrowth of this relationship, complainant formally asked defendant if he could take one of defendant’s reiki classes and defendant agreed to become complainant’s reiki teacher. Defendant, as a master reiki teacher and practitioner, instructed his reiki students in an organized class and controlled the information the students learned. This Court has held that a teacher is in a position of authority over a student as a matter of law. *Premo, supra*, 213 Mich App 411.” *Id.* at 371.

Defendant claimed it was error for the trial court to give the following jury instruction:

“Fourth, *that at the time of the alleged act, the Defendant was in a position of authority over [the complainant], that is, a teacher of reiki . . .*” *Id.* at 375. [Emphasis in original.]

The prosecutor conceded that giving this instruction was plain error, for it “took an essential element of the offense away from the jury’s determination.” *Id.* The Court of Appeals agreed, stating: “This instruction informed the jury that a finding that defendant was a reiki instructor amounted to a finding that defendant was in a position of authority.” *Id.* Nevertheless, the Court of Appeals did not reverse defendant’s conviction based upon this erroneous instruction. Defendant failed to preserve this issue at trial by objecting, and he failed to show the requisite prejudice to his “substantial rights.” Moreover, the Court of Appeals found ample evidence of defendant’s position of authority over complainant. *Id.* at 375-376.

\*One type of hand position is “kundalini,” which involves the use of genital hand positions to open energy points and to gain enlightenment through sexual energy. However, defendant’s former reiki teacher testified that genital touching, masturbation, and discussions of sexual energy are improper in the study of reiki. See *Id.* at 367 n 2.

\*The Court relied on the holding and analysis in *People v Reid*, *supra*, finding it “equally applicable” to CSC II, despite that case being decided under CSC I. *Knapp*, *supra* at 369.

\*On what constitutes “force or coercion,” see Section 2.5(I) and MCL 750.520b(f), which applies to CSC I, II, and III, and MCL 750.520e(b), which applies to CSC IV.

Next, the Court of Appeals held that defendant used his position of authority as a reiki teacher to “coerce” the victim to submit, even though the classes were non-traditional in nature:\*

“The mere fact that defendant taught in a non-traditional classroom setting does not mean that his position was any less authoritative than in a traditional teacher-student relationship. . . . [T]he characteristic dominant and subordinate roles in any teacher-student relationship places the student in a position of special vulnerability . . . . Complainant was the only young adolescent in a class taught and attended by adults. Given his age, the unconventional nature of the ‘curriculum,’ and the trust defendant fostered with complainant’s mother, complainant was highly susceptible to abuse. Under these circumstances, we find that defendant exploited and abused his position of authority to compel an extremely vulnerable youth to engage in sexual contact. This clearly constitutes coercion for purposes of this section of the CSC II statute.” *Id.* at 371-372.

Apart from its use in the foregoing contexts, a “position of authority,” if it exists factually, may also be used to establish “coercion” under the “force or coercion” elements in CSC I, CSC II, CSC III, and CSC IV. The following cases hold that a defendant’s “position of authority” over the victim, and the use of that authority to make the victim submit, constitute “coercion” under the definition of “force or coercion”:\*

- F *People v Premo*, 213 Mich App 406, 411 (1995) (A teacher charged with CSC IV involving “force or coercion” is in a “position of authority” over students, and the exploitation of this authority—by pinching the students’ buttocks on school grounds—constituted implied, legal, or constructive coercion under the definition of “force or coercion.”)
- F *People v Regts*, 219 Mich App 294, 295-296 (1996) (A psychotherapist convicted of CSC IV and attempted CSC IV is in a “position of authority” over his patient, and the exploitation of this authority—by manipulating “therapy sessions to establish a relationship that would permit his sexual advances to be accepted without protest”—constituted “coercion.”)

## U. “Reasonably Be Construed As Being For The Purpose of Sexual Arousal or Gratification . . .”

This phrase is used in the “sexual contact” element of the CSC Act, MCL 750.520a(l), which states as follows:

“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can *reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:*

“(i) *Revenge.*

“(ii) *To inflict humiliation.*

“(iii) *Out of anger.*” [Emphasis added.]

The language emphasized in the foregoing statute only sets forth an element in sexual “contact” offenses. *People v Bailey*, 103 Mich App 619, 626-627 (1981). Because this language is not contained within the “sexual penetration” definition of MCL 750.520a(m), it is not an element in offenses involving “sexual penetration.”

Michigan appellate opinions have established an objective or “reasonable person” standard when determining whether a sexual touching was for the purpose of sexual arousal or gratification. Therefore, while a defendant must intend the sexual touching, his or her subjective or specific intent as to sexual arousal or gratification is irrelevant. See *People v Fisher*, 77 Mich App 6 (1977); and *People v Piper*, 223 Mich App 642 (1997). In *Fisher*, the defendant attacked his CSC II conviction, arguing that the prosecutor should have proven the defendant’s subjective purpose or specific intent in the sexual touching. The Court of Appeals disagreed:

“The offense with which the defendant was charged does not require the prosecutor to prove the defendant’s purpose or specific intent . . . . Under the MCLA 750.520a(g) [now found in MCL 750.520a(l)], definition of ‘sexual contact,’ the defendant’s specific intent is not an essential element of the crime. The actor must touch a genital area intentionally, but he need not act with the purpose of sexual gratification. Rather, it suffices if ‘that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.’” [Emphasis in original.] *Id.* at 12-13.

The Court of Appeals in *Piper* affirmed the principal enunciated in *Fisher*, but went further than *Fisher* and specifically articulated an objective “reasonable person” standard:

“The language of the current statute . . . requires proof that the defendant engaged in intentional touching of the complainant’s intimate parts or the clothing immediately covering that area. . . . Thus, proof of intentional touching, alone, is insufficient to establish guilt. The statute further requires that the prosecution prove the intentional touch could “*reasonably be construed* as being for [a] sexual purpose.” . . . The statute’s language is clear and its inclusion of a reasonable person standard provides a structure to guide the jury’s determination of the purpose of the contact. . . . Consequently, contrary to defendant’s argument, a jury is properly limited to a determination whether the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose.” *Piper, supra* at 646-647. [Emphasis in original.]

The defendant in *Piper* also challenged one of the jury instructions, claiming it confused the jury because it allowed them to determine “intent” from any person’s perspective, not exclusively from the defendant’s. The Court of Appeals disagreed with the defendant again and held:

“[T]he statute sets forth a “reasonable person” standard. Accordingly, the statutory language did not permit the court to instruct the jury, as defendant requested, to consider defendant’s mens rea—that defendant specifically intended sexual gratification when he touched the complainant. Defendant’s mens rea is not relevant to this general intent crime.” *Id.* at 650.

\*See Sections 2.5(J) “Intimate Parts,” and 2.5(U) “Reasonably be Construed as Being for the Purpose of Sexual Arousal or Gratification.”

## V. “Sexual Contact”

MCL 750.520a(l) defines “sexual contact”<sup>\*</sup> as follows:

“‘Sexual contact’ includes the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

- “(i) Revenge.
- “(ii) To inflict humiliation.
- “(iii) Out of anger.”

The term “sexual contact” exists in the following CSC Crimes:

- F CSC II, MCL 750.520c(1).
- F CSC IV, MCL 750.520e(1).

**Note:** Additionally, although “sexual contact” does not appear in the crime of Assault with Intent to Commit CSC II, MCL 750.520g(2), the crime of CSC II contains “sexual contact.”

## W. “Sexual Penetration”

MCL 750.520a(m) defines “sexual penetration” as follows:

“‘Sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.”

The term “sexual penetration” exists in the following CSC Crimes:

- F CSC I, MCL 750.520b(1).
- F CSC III, MCL 750.520d(1).
- F Assault with Intent to Commit Sexual Involving Penetration, MCL 750.520g(1).

CJI2d 20.1 (CSC I) and CJI2d 20.12 (CSC III) define “sexual penetration” as a sexual act that involves any of the following:

- 1) entry into a person’s genital opening or anal opening by the defendant’s penis or finger or tongue or object. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.
- 2) entry into a person’s mouth by the defendant’s penis. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.



- 3) touching of a person's genital openings or genital organs with the defendant's mouth or tongue.
- 4) entry by any part of one person's body or some object into the genital or anal opening of another person's body. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.

The sexual acts listed in “sexual penetration” are not further defined in the CSC Act. Accordingly, these sexual acts, or words and phrases, must be accorded their “plain and ordinary” meaning. *People v Crippen*, 242 Mich App 278, 283 (2000). Some appellate opinions, after consulting dictionaries, have defined some of these sexual acts and have, in the case of “fellatio” and “cunnilingus,” drawn critical distinctions between them. For instance, while both of these sex acts are deemed “sexual penetration” by definition under the CSC Act, only fellatio by its “plain and ordinary” meaning requires some form of “penetration” or “intrusion.” Cunnilingus, by its “plain and ordinary” meaning, does not. Cunnilingus is satisfied by “oral contact” alone, despite being deemed “sexual penetration” under the CSC Act. “Fellatio” and “cunnilingus” are discussed in the first two sections below, followed in the last three sections by “sexual intercourse,” “anal intercourse,” and “any other intrusion.”

Under the CSC Act, the term “sexual penetration,” in contrast to the term “sexual contact,” requires no proof of the perpetrator's sexual purpose.\* The word “sexual” in “sexual penetration” refers to the perpetrator's conduct, not his or her purpose.

\*See Section 2.5(V) for the definition of “sexual contact.”

## 1. Fellatio

The Court of Appeals in *People v Harris*, 158 Mich App 463, 469 (1987), consulted dictionary definitions to assess the meaning of “fellatio”:

“[Fellatio] is defined in *Dorland's Illustrated Medical Dictionary*, 23d ed, as: ‘The act of taking the penis into the mouth.’ Obviously, by definition, fellatio includes the necessity of a penetration. *Webster's New Collegiate Dictionary* indicates similarly that the word indicates ‘to suck’ or ‘oral stimulation of the penis.’”

In *People v Johnson*, 432 Mich 931 (1989), the Michigan Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals and adopted Judge Michael Kelly's dissenting opinion in *People v Johnson*, 164 Mich App 634, 646-649 (1987), in which Judge Kelly rejected the majority's conclusion that a “kiss of a penis” established sexual penetration under the definition of “fellatio”: “To do so blurs the distinction between contact and penetration. There is no testimony here or evidence to support any penetration, however slight, and I think therefore the defendant was wrongly charged.” *Id.* at 648.

Judge Kelly also recognized that other appellate opinions hold that “fellatio” may include oral contact of a male's genitals. Regarding these opinions, he wrote: “To the extent that *People v Camon*, 110 Mich App 474; 313 NW2d

322 (1981), *lv den* 414 Mich 859 (1982), and *People v Sommerville* 100 Mich App 470; 299 NW2d 387 (1980), *lv den* 417 Mich 1022 (1983), are read to define fellatio as including any oral contact with the male genitals, I think they are wrongly decided.” *Johnson, supra* at 164 Mich App 648-649. Accordingly, both *Camon* and *Sommerville*—to the extent they define fellatio as including oral contact without penetration—are abrogated by *Johnson*.

In *People v Reid*, 233 Mich App 457, 480 (1999), the Court of Appeals construed Judge Kelly’s dissent in *Johnson* as defining “fellatio” as the “entry of a penis into another person’s mouth.” By doing so, the Court invalidated the jury instruction at issue, for it defined “fellatio” as only requiring the “touching of the [complainant’s] genital organs with the Defendant’s mouth or tongue.” *Reid, supra* at 479-480, quoting the trial court’s jury instruction.

## 2. Cunnilingus

Cunnilingus is satisfied by the placing of a mouth on a woman’s urethral opening, vaginal opening, or labia. *People v Legg*, 197 Mich App 131, 132-133 (1992). No actual intrusion or penetration of a person’s vagina\* or genital organs is necessary to establish cunnilingus. “Cunnilingus is nowhere defined to require an intrusion,” stated the Court of Appeals in *People v Sommerville*, 100 Mich App 470, 480 (1980). The term “cunnilingus” is contained within the definition of “sexual penetration” based on the belief that it is “as offensive to the victim and to society as is forcible penetration.” *Id.* at 481.

**Note:** Judge Kelly’s dissenting opinion in *People v Johnson*, 164 Mich App 634 (1987), which was adopted by the Michigan Supreme Court in *People v Johnson*, 432 Mich 931 (1989), stated: “I think the *Sommerville* Court correctly determined that the oral contact for cunnilingus is sufficient because by definition, penetration is not required. . . . [T]he same is not true of fellatio.” *Johnson, supra* at 164 Mich App at 649 n 1.

Cunnilingus does not require any intrusion or penetration because, by definition, the “plain and ordinary” meaning of cunnilingus is oral contact with, or the placing of a mouth upon, a woman’s *external* genital organs. In coming to this conclusion, the Court of Appeals, in *People v Harris, supra*, relied on dictionary definitions:

“*Ballantine’s Law Dictionary, 3d ed*, defines ‘cunnilingus’ as ‘[a]n act committed with the mouth and the female sex organ, or oral-genital contact.’ Returning to *Dorland*, it defines ‘cunnilingus’ as ‘the licking of the vulva or clitoris.’ The vulva is explained to be: ‘The external genital organs of the female, including the *mons pubes* [sic], *labia majora*, and other structures between the *labia*.’” *Id.* at 469.\* [Emphasis in original.]

Using these definitions, the *Harris* Court upheld a jury instruction that read “Cunnilingus in and of itself is penetration,” stating as follows:

“Accordingly, it is evident that cunnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself [sic], or the mons pubes [sic]. Therefore, there is no requirement, if cunnilingus is

\**Webster’s New World Dictionary* (1976) defines “vagina,” in part, as “the canal leading from the vulva to the uterus.”

\**Webster’s New World Dictionary* (1976) defines “mons pubis” as “the fleshy, rounded elevation, covered with pubic hair, at the lower part of the adult human abdomen.”

performed, that there be something additional in the way of penetration for that sexual act to have been performed. Thus, the trial court correctly indicated that an act of cunnilingus involved by definition an act of sexual penetration.” *Id.* at 470.

“Genital opening” includes a female’s labia majora.\* In a case involving sexual intercourse, the Court of Appeals, in *People v Bristol*, 115 Mich App 236 (1981), determined the bounds of what is required for “sexual penetration” under the CSC Act. The victim in *Bristol*, a four-year-old girl, alleged that defendant penetrated her with his penis. The physical evidence showed a bruising of the victim’s labia majora and an abrasion to her labia minora. But because her hymenal ring was still intact, defendant argued there was no evidence of “intrusion, however slight,” into the victim’s “genital opening.” *Id.* at 237. The Court of Appeals disagreed, and, after reviewing the Legislative intent of “penetration,” held that the labia majora is part of the “genital opening” and a bruising of the labia is therefore “sexual penetration”:

“One object of the Legislature in providing for degrees of criminal sexual conduct was to differentiate between sexual acts which affected only the body surfaces of the victim and those which involved intrusion into the body cavities, in the instant case the female ‘genital opening’. In view of the fact that the penetration of the labia majora is beyond the body surface, a definition of the female genital opening that excluded the labia would be inconsistent with the ordinary meaning of female genital openings. The fact that the Legislature used ‘genital opening’ rather than ‘vagina’ indicates an intent to include the labia.” *Id.* at 238.

The Court of Appeals in *Legg, supra*, using the terms and definitions established in *Harris* and *Bristol*, held that “cunnilingus” is satisfied by the touching of a mouth on a woman’s urethral opening, vaginal opening, or labia:

“An act of cunnilingus, by definition, involves an act of sexual penetration. . . . The complainant said that defendant touched ‘[t]he part [of her body] that I go to the bathroom with’ with his mouth. This testimony supported the verdict. Defendant’s touching with his mouth of the urethral opening, vaginal opening, or labia establish cunnilingus. The labia are included in the ‘genital openings’ of the female; see *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981).” *Legg, supra* at 132-133.

The Court in *Legg* also held that the jury instruction on cunnilingus was incomplete and should be expanded beyond requiring an oral touching of a woman’s vagina to include, as stated above in *Harris*, the touching of a woman’s genital openings: “CJI2d 20.1(2)(c), which describes cunnilingus as the ‘touching of [name complainant’s] vagina with the defendant’s mouth or tongue’ is also incomplete and should be amended. A revised instruction for cunnilingus should reflect the definition given in *Harris*, which does not limit the offense to touching of the vagina itself.”\* *Legg, supra* at 133-134.

Detailed testimony is not required to sustain proof of cunnilingus. The defense in *People v Lemons*, 454 Mich 234 (1997), argued that a victim’s general testimony about performing “oral sex on her stepmother” was too vague and that cunnilingus requires “specific testimony indicating some kind of oral

\*Webster’s New World Dictionary (1976) defines “labia majora” as “the outer folds of skin of the vulva, one on either side”; it also defines “labia minora” as “the two folds of mucous membrane within the labia majora.”

\*CJI2d 20.1(2)(c) was amended in October 1993 to reflect the concerns in *Legg*.

sexual act, such as lips or tongue or vaginal area or licking or something to that effect.” *Id.* at 252 n 28. The Supreme Court disagreed:

\*See also *Legg, supra* at 133 (“Defendant’s touching with his mouth of the urethral opening, vaginal opening, or labia establish cunnilingus.”)

“The distinction advocated by the defendant would be contrary to the policy of the act and would discourage child victims from testifying by requiring them to describe explicitly the method by which they performed cunnilingus. Testimony that a child victim performed oral sex and placed her face into the vaginal area of an adult does not raise a dispute on an element distinguishing the cognate offense from the principal charge.”\* *Id.* at 255.

The Supreme Court in *Lemons* upheld testimony that only established the placing of a “face on the . . . vagina”:

“Although we have found that penetration for the purpose of establishing fellatio requires actual penetration rather than mere kissing or contact where the defendant is engaging in contact with a child’s penis, *People v Johnson*, 432 Mich 931 [parallel citation omitted] (1989), the distinction is illogical where the victim testifies . . . that she performed oral sex and placed her face on the defendant’s vagina. The only *reasonable interpretation* of this testimony . . . is that it was intended to be cunnilingus, which, by definition, does not require penetration.” *Id.* at 254-255. [Emphasis added.]

### 3. Sexual Intercourse

“Sexual intercourse” is undefined in the CSC Act and in many dictionaries. However, the common meaning of the phrase is the insertion of a male sex organ into a female sex organ. To sustain a finding of “sexual intercourse” under the CSC Act, only penetration of the labia majora by the penis is necessary; no penetration of the vagina is needed.

\**Webster’s New World Dictionary* (1976) defines “labia majora” as “the outer folds of skin of the vulva, one on either side”; it also defines “labia minora” as “the two folds of mucous membrane within the labia majora.”

In *People v Bristol*, 115 Mich App 236 (1981), the Court of Appeals held that penetration of the labia majora\* constitutes penetration of a “genital opening” within the meaning and intent of the statutory definition of “sexual penetration.” In *Bristol*, a case involving sexual intercourse, the victim, a four-year-old girl, alleged that defendant penetrated her with his penis. The physical evidence showed a bruising of the victim’s labia majora and an abrasion to her labia minora. But because her hymenal ring was still intact, defendant argued there was no evidence of “intrusion, however slight,” into the victim’s “genital opening.” *Id.* at 237. The Court of Appeals disagreed, and after reviewing the Legislative intent of “penetration,” held that the labia majora is part of the “genital opening” and a bruising of the labia is therefore “sexual penetration”:

“One object of the Legislature in providing for degrees of criminal sexual conduct was to differentiate between sexual acts which affected only the body surfaces of the victim and those which involved intrusion into the body cavities, in the instant case the female ‘genital opening’. In view of the fact that the penetration of the labia majora is beyond the body surface, a definition of the female genital opening that excluded the labia would be inconsistent with the ordinary meaning of female genital openings. The fact that

the Legislature used ‘genital opening’ rather than ‘vagina’ indicates an intent to include the labia.” *Id.* at 238.

#### 4. Anal Intercourse

“Anal intercourse” is undefined in the CSC Act and in many dictionaries. However, the common meaning of “anal intercourse” is the insertion of a male sex organ into the anus or anal opening of another person.\*

Appellate courts have upheld imprecise testimony concerning the entering of a penis into another person’s anus or anal opening. In *People v Wrenn*, 434 Mich 885 (1990), the Michigan Supreme Court reinstated a CSC I conviction, finding sufficient evidence of intrusion, however slight, from an 8-year-old victim’s testimony that the defendant “put his private in my butt.”

In *People v Zinn*, 63 Mich App 204, 206-210 (1975), the Court of Appeals, in a sodomy case, found sufficient evidence of “sexual penetration” by drawing inferences from the victim’s inexact testimony that defendant “stuck his penis in my ass”:

“Defendant . . . argued that . . . the complaining witness . . . was using the word ‘ass’ to mean ‘buttocks’, and not ‘anus’. This, says defendant, is a result of the fact that the term ‘ass’ can be defined as either of the other two terms mentioned. . . . [I]f that is so, then the jury was free to infer that the complaining witness truly meant ‘anus’ when he testified. This would certainly be a reasonable inference . . . . We hold that there was ample evidence to warrant a jury verdict of guilty beyond a reasonable doubt of the crime charged.” *Id.* at 210.

#### 5. Any Other Act

The definition of “sexual penetration”\* contains a “catch-all” provision, based upon the following language: “or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.”

Using a finger to penetrate a victim’s vagina or anal opening is “sexual penetration.” *People v Callahan*, 152 Mich App 29, 31-32 (1986); and *People v Anderson*, 111 Mich App 671, 678 (1981).

An intrusion by an object, even when covered by clothing, is actionable as “sexual penetration.” *People v Hammons*, 210 Mich App 554, 557 (1995).

### X. “Victim”

MCL 750.520a(n), defines “victim” as “the person alleging to have been subjected to criminal sexual conduct.”

CSC crimes require a live victim at the time of sexual penetration or contact. In *People v Hutner*, 209 Mich App 280 (1995), the defendant sexually

\*Webster’s New World Dictionary (1976) defines “anus” as “the opening at the lower end of the alimentary canal.”

\*See MCL 750.520a(m) and Section 2.5(W).

penetrated a prostitute after he had killed her. In construing the term “victim” as used under the CSC Act, the Court held:

“We conclude that the crime of criminal sexual conduct requires a live victim at the time of penetration. . . . A dead body is not a person. It cannot allege anything. A dead body has no will to overcome. It does not have the same potential to suffer physically or mentally as a live or even an unconscious or dying victim.” *Id.* at 283-284.

## 2.6 Lesser-Included Offenses Under CSC Act

This section briefly addresses lesser-included offenses and includes discussion of recent changes made in this area by the Michigan Supreme Court in *People v Cornell*, 466 Mich 335 (2002).

### A. Types of Lesser-Included Offenses

Two types of lesser-included offenses exist: (1) necessarily included offenses; and (2) cognate (or allied) lesser offenses. A necessarily included offense is one in which all the elements of the offense are contained within the greater offense, and it is impossible to commit the greater offense without also having committed the lesser. *People v Bearss*, 463 Mich 623, 627 (2001). See also *People v Veling*, 443 Mich 23, 36 (1993) (the evidence at trial will always support the lesser offense if it supported the greater). A cognate or allied lesser offense is one that “share[s] some common elements, and [is] of the same class or category as the greater offense, but ha[s] some additional elements not found in the greater offense.” *People v Perry*, 460 Mich 55, 61 (1999), quoting *People v Hendricks*, 446 Mich 435, 443 (1994).

**Note:** For a comprehensive discussion of lesser-included offenses, see *Hendricks*, *supra* at 441-451 and *People v Bailey*, 451 Mich 657, 667-676 (1996).

### B. Applicable Statute and Three-Part Test

In *People v Cornell*, 466 Mich 335 (2002), the Michigan Supreme Court ruled that MCL 768.32(1), a seldom-used statute governing lesser-included offenses, must be applied to offenses that are expressly divided into degrees and to offenses in which different grades or offenses or degrees of enormity are recognized. *Cornell*, *supra* at 353-354, citing *Hanna v People*, 19 Mich 316 (1869).

MCL 768.32(1) provides:

“Except as provided in subsection (2),\* upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense

\*MCL 768.32(2) covers lesser-included offenses for specified controlled substance offenses, which are not relevant here.

inferior to that charged in the indictment, or of an attempt to commit that offense.”

**Note:** Regarding the applicability of the foregoing statute, the Supreme Court in *Cornell* also cited MCL 768.29, which requires a trial court to “instruct the jury as to the law applicable to the case.” *Cornell, supra* at 341.

In reference to MCL 768.32(1), and its application to lesser-included offenses, the Supreme Court in *Cornell* made a number of determinations. First, it explained that the word “inferior” in MCL 768.32(1) means that the statute only authorizes lesser offenses that either are necessarily included in the greater offense or that are attempts to commit the greater offense. *Cornell, supra* at 354, 354 n 7. Second, the Supreme Court held that, based on its interpretation of the statute, MCL 768.32(1) “does not permit cognate lesser offenses.” *Cornell, supra* at 354. On this last point, see also *People v Pasha*, 466 Mich 378, 384 n 9 (2002) (“Following our decision in *Cornell*, the trier of fact may no longer convict a defendant of a cognate lesser offense.”). Third, the Supreme Court held that instructions for necessarily included lesser offenses under MCL 768.32(1) are not limited to felonies and may include misdemeanors. *Cornell, supra* at 358-359. In so holding, the Supreme Court expressly overruled the following cases that permitted cognate lesser offenses and that “blatantly disregarded” MCL 768.32(1): *People v Jones*, 395 Mich 379 (1975); *People v Chamblis*, 395 Mich 408 (1975); *People v Stephens*, 416 Mich 252 (1982); and *People v Jenkins*, 395 Mich 440 (1975). *Cornell, supra* at 357-358. Finally, the Supreme Court expressly limited the retroactive effect of *Cornell* to “those cases pending on appeal in which the issue has been raised and preserved.” *Id.* at 367.

The Supreme Court in *Cornell* established the following rule for determining whether an instruction for a necessarily included lesser offense is proper:

“[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *Cornell, supra* at 357.

From the foregoing discussion, it is clear that a trial court must conduct a strict elements test under MCL 768.32(1), and it also must apply the facts of the case to the lesser offense. These requirements are summarized as follows:

- F Compare the elements of the greater and lesser offenses under MCL 768.32(1) to determine whether the requested instruction is for a necessarily included lesser offense and not a cognate lesser offense (i.e., whether the offense has all its elements contained within the greater offense, and it is impossible to commit the greater offense without also having committed the lesser);
- F Determine whether the distinguishing element is factually disputed; and
- F Determine whether the lesser offense is supported by a rational view of the evidence.

In *Cornell*, the Supreme Court applied MCL 768.32(1), along with the foregoing test, and concluded that the misdemeanor offense of breaking and entering without permission, MCL 750.115, is a necessarily included lesser offense of felony breaking and entering with the intent to commit larceny, MCL 750.110. Its analysis went as follows:

“The elements of breaking and entering with intent to commit larceny are: (1) the defendant broke into a building, (2) the defendant entered the building, and (3) at the time of the breaking and entering, the defendant intended to commit a larceny therein. [Citation omitted.] Breaking and entering without permission requires (1) breaking and entering or (2) entering the building (3) without the owner’s permission. It is impossible to commit the greater offense without first committing the lesser offense.

“Moreover, a conviction of the greater offense requires the jury to find a disputed factual element—the intent to commit larceny—which is not part of the lesser offense. The evidence presented at trial offered conflicting reasons about why defendant [and others] went to the home and whether they intended to steal anything. . . . Thus, intent to commit larceny—the factual element differentiating the greater offense from the lesser offense—was in dispute. Because there was evidence to support a finding that defendant lacked the intent to commit larceny, the trial court erred in refusing to give the requested misdemeanor instruction of breaking and entering without permission.” *Cornell*, *supra* at 360-361.

See also *People v Silver*, 466 Mich 386, 392-393 (2002) (breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion and, as applied to facts of case, was appropriate since the distinguishing element was factually disputed and substantial evidence supported the lesser included offense); and *People v Reese*, 466 Mich 440, 446-448 (2002) (unarmed robbery is a necessarily included lesser offense of armed robbery, but, as applied to facts of case, was an improper instruction since the distinguishing element was not factually disputed).

### C. Appellate Court Determinations of Lesser Included Offenses

The following is a list of pre-*Cornell* Michigan appellate court rulings on lesser-included offenses (as they relate to criminal sexual conduct offenses).

**Note:** Trial court judges are cautioned to proceed on a case-by-case basis, applying MCL 768.32(1) and *Cornell*’s three-part test, and to conduct a detailed review of the rationale in any relevant opinion below.

- F *People v Spivey*, 202 Mich App 719, 727-728 (1993) (CSC III is a necessarily included lesser offense of CSC I).
- F *People v Mosko*, 441 Mich 49, 497-501 (1992) (CSC III is a necessarily included lesser offense of CSC I).
- F *People v Lemons*, 454 Mich 234, 253-254 (1997) (CSC II is a cognate lesser offense of CSC I because CSC II requires proof of an intent to seek sexual gratification while CSC I does not).



- F *People v Wilhelm (On Rehearing)*, 190 Mich App 574, 576-577 (1991) (CSC II is not a necessarily included lesser offense of CSC I, but is a cognate lesser offense).
- F *People v Norman*, 184 Mich App 255, 260-261 (1990) (CSC IV is not a necessarily included lesser offense of CSC II since defendant could have committed CSC II (age of victim under 13) without committing CSC IV; however, CSC II is a cognate lesser offense of CSC I).
- F *People v Baker #2*, 103 Mich App 704, 712-713 (1981) (CSC IV is not a necessarily-included offense of CSC I but is a “factually-included offense” of CSC I).
- F *People v Garrow*, 99 Mich App 834, 838-840 (1980) (CSC II is not a necessarily included lesser offense of CSC I since proof of sexual purpose is not required for conviction of CSC I).
- F *People v Hack*, 219 Mich App 299, 307-308 (1996) (gross indecency is not a cognate lesser offense of CSC II).
- F *People v Medrano*, 101 Mich App 577, 581-582 (1980) (gross indecency is not a necessarily included lesser offense of CSC III, but may be considered as a cognate lesser offense).
- F *People v Corbiere*, 220 Mich App 260, 262-267 (1996) (domestic assault and battery is not a lesser included offense of CSC III because of the difference in the statutes’ intent requirements and the societal interests protected).
- F *People v Welch*, 158 Mich App 87 (1987) (contributing to the delinquency of a minor is not a lesser-included offense of criminal sexual conduct).
- F *People v Harris*, 133 Mich App 646, 650-651 (1984) (felonious assault is not cognate lesser offense since using a weapon to assist in making an assault is different from engaging in sexual penetration while armed).
- F *People v Payne*, 90 Mich App 713 (1979) (assault with intent to do great bodily harm less than murder is neither a necessarily lesser included offense nor a cognate lesser offense of CSC I).

## 2.7 CHARTS: Criminal Sexual Conduct Offenses

The charts regarding criminal sexual conduct offenses begin on the next page.

<b>CRIMINAL SEXUAL CONDUCT OFFENSES</b>						
	<b>CSC 1st</b> See Section 2.2(A)	<b>CSC 2nd</b> See Section 2.3(A)	<b>CSC 3rd</b> See Section 2.2(B)	<b>CSC 4th</b> See Section 2.3(B)	<b>Assault with Intent to Commit CSC Involving Penetration</b> See Section 2.4(A)	<b>Assault with Intent to Commit CSC 2nd (contact)</b> See Section 2.4(B)
<b>Statute</b>	MCL 750.520b	MCL 750.520c	MCL 750.520d	MCL 750.520e	MCL 750.520g(1)	MCL 750.520g(2)
<b>Jury Instruction</b>	CJI2d 20.1, 20.3–20.11	CJI2d 20.2–20.11	CJI2d 20.12, 20.14–20.16	CJI2d 20.13, 20.15–20.16	CJI2d 20.17, 20.19–20.23	CJI2d 20.18, 20.3–20.11
<b>Penalty</b>	Felony: Life	Felony: 15 yrs	Felony: 15 yrs	Misd: 2 yrs and/or \$500	Felony: 10 yrs	Felony: 5 yrs
<b>Intent<sup>1</sup></b>	General	General	General	General	Specific	Specific
<b>Statute of Limitations</b>	None	10 yrs or by victim's 21st birthday, whichever is later	10 yrs or by victim's 21st birthday, whichever is later	10 yrs or by victim's 21st birthday, whichever is later	10 yrs or by victim's 21st birthday, whichever is later	10 yrs or by victim's 21st birthday, whichever is later
<b>HYTA<sup>2</sup></b>	No	Yes: 3 yrs DOC Supervision Facility; 3 yrs probation; 1 yr jail	Yes: 3 yrs DOC Supervision Facility; 3 yrs probation; 1 yr jail	Yes: 3 yrs DOC Supervision Facility; 3 yrs probation; 1 yr jail	Yes: 3 yrs DOC Supervision Facility; 3 yrs probation; 1 yr jail	Yes: 3 yrs DOC Supervision Facility; 3 yrs probation; 1 yr jail
<b>Attempts<sup>3</sup></b>	Felony: 5 yrs	Felony: 5 yrs	Felony: 5 yrs	Misd: 1 yr	Felony: 5 yrs	Felony: 2.5 yrs
<b>Sex Offender Registry<sup>4</sup></b>	Yes Adults: Registration & public notification Juveniles: Registration only (public notification as required in MCL 28.728(2))	Yes Adults: Registration & public notification Juveniles: Registration only (public notification as required in MCL 28.728(2))	Yes Adults: Registration & public notification Juveniles: Registration only (public notification as required in MCL 28.728(2))	Yes Adults: Registration & public notification Juveniles: Registration only (public notification as required in MCL 28.728(2))	Yes Adults: Registration & public notification Juveniles: Registration only (public notification as required in MCL 28.728(2))	Yes Adults: Registration & public notification Juveniles: Registration only (public notification as required in MCL 28.728(2))
<b>Sentencing Guidelines</b>	Group = Person Class = A TIS = Yes	Group = Person Class = C TIS = Yes	Group = Person Class = B TIS = Yes	Group = Person Class = G TIS = Yes	Group = Person Class = D TIS = Yes	Group = Person Class = E TIS = Yes
<b>Probation<sup>5</sup></b>	No	Yes: 5 yrs maximum	No	Yes: 2 yrs maximum	Yes: 5 yrs maximum	Yes: 5 yrs maximum
<b>Work Release<sup>6</sup></b>	No	No	No	Yes	No	No
<b>School Release<sup>7</sup></b>	No	No	No	Yes	No	No
<p><b>Footnotes</b></p> <p><sup>1</sup><i>People v Langworthy</i>, 416 Mich 630 (82); <i>People v Brewer</i>, 101 Mich App 194 (80); <i>People v Corbiere</i>, 220 Mich App 260 (96); <i>People v Lasky</i>, 157 Mich App 265 (87); and <i>People v Snell</i>, 118 Mich App 750 (82)</p> <p><sup>2</sup>Holmes Youthful Trainee Act, MCL 762.11 et seq.</p> <p><sup>3</sup>MCL 750.92; <i>People v Loveday</i>, 390 Mich 711 (1973)</p> <p><sup>4</sup>MCL 28.721 et seq. (includes attempts and conspiracies and HYTA status)</p> <p><sup>5</sup>MCL 771.1</p> <p><sup>6</sup>MCL 801.251</p> <p><sup>7</sup><i>Id.</i></p>						

### CRIMINAL SEXUAL CONDUCT OFFENSES

	CSC 1st See Section 2.2(A)	CSC 2nd See Section 2.3(A)	CSC 3rd See Section 2.2(B)	CSC 4th See Section 2.3(B)	Assault with Intent to Commit CSC Involving Penetration See Section 2.4(A)	Assault with Intent to Commit CSC 2nd (contact)  See Section 2.4(B)
<b>Elements of Offense</b>	<p><b>Sexual penetration <u>and</u></b> at least one other circumstance:</p> <ol style="list-style-type: none"> <li>Force or coercion <u>and</u> personal injury.</li> <li>Victim is one of the following: <ol style="list-style-type: none"> <li>under 13;</li> <li>13–15 (inclusive) <u>and</u> – a household member; – related by blood or affinity to 4th degree; or</li> <li>Defendant in position of authority.</li> </ol> </li> <li>Involves the commission of any other felony.</li> <li>Sexual act aided and abetted by another <u>and</u> victim one of the following: <ol style="list-style-type: none"> <li>mentally incapable;</li> <li>mentally incapacitated;</li> <li>physically helpless; or</li> <li>forced or coerced.</li> </ol> </li> <li>Defendant armed with weapon or object.</li> <li>Personal injury <u>and</u> victim is one of the following: <ol style="list-style-type: none"> <li>mentally incapable;</li> <li>mentally incapacitated; or</li> <li>physically helpless.</li> </ol> </li> <li>Victim mentally incapable, mentally disabled, mentally incapacitated, or physically helpless <u>and</u> <ol style="list-style-type: none"> <li>Defendant related by blood or affinity to 4th degree; or</li> <li>Defendant in position of authority.</li> </ol> </li> </ol>	<p><b>Sexual contact with sexual purpose <u>and</u></b> at least one other circumstance:</p> <ol style="list-style-type: none"> <li>Force or coercion <u>and</u> personal injury.</li> <li>Victim is one of the following: <ol style="list-style-type: none"> <li>under 13;</li> <li>13–15 (inclusive) <u>and</u> – a household member; – related by blood or affinity to 4th degree; or</li> <li>Defendant in position of authority; or</li> <li>prisoner, probationer or parolee and defendant is employee or volunteer of entity with control over victim.</li> </ol> </li> <li>Involves the commission of any other felony.</li> <li>Sexual act aided &amp; abetted by another <u>and</u> victim one of the following: <ol style="list-style-type: none"> <li>mentally incapable;</li> <li>mentally incapacitated;</li> <li>physically helpless; or</li> <li>forced or coerced.</li> </ol> </li> <li>Defendant armed with weapon or object.</li> <li>Personal injury <u>and</u> victim is one of the following: <ol style="list-style-type: none"> <li>mentally incapable;</li> <li>mentally incapacitated; or</li> <li>physically helpless.</li> </ol> </li> <li>Victim mentally incapable, mentally disabled, mentally incapacitated, or physically helpless <u>and</u> <ol style="list-style-type: none"> <li>Defendant related by blood or affinity to 4th degree; or</li> <li>Defendant in position of authority.</li> </ol> </li> </ol>	<p><b>Sexual penetration <u>and</u></b> at least one other circumstance:</p> <ol style="list-style-type: none"> <li>Force or coercion.</li> <li>Victim is one of the following: <ol style="list-style-type: none"> <li>13–15 (inclusive);</li> <li>mentally incapable;</li> <li>mentally incapacitated;</li> <li>physically helpless; or</li> <li>related by blood or affinity to 3rd degree.</li> </ol> </li> </ol>	<p><b>Sexual contact with sexual purpose <u>and</u></b> at least one other circumstance:</p> <ol style="list-style-type: none"> <li>Force or coercion.</li> <li>Victim is one of the following: <ol style="list-style-type: none"> <li>13–15 (inclusive) and defendant is 5 or more years older than victim;</li> <li>mentally incapable;</li> <li>mentally incapacitated;</li> <li>physically helpless;</li> <li>related by blood or affinity to 3rd degree; or</li> <li>client or patient of defendant who is “mental health professional” (contact must occur during or within two years of termination of relationship).</li> </ol> </li> </ol>	<p><b>Assault</b> with specific intent to commit sexual penetration.<sup>1</sup></p>	<p><b>Assault</b> with specific intent to commit <b>sexual contact</b> of a victim’s intimate parts for sexual arousal or gratification and the specific intent to commit at least one other circumstance:<sup>2</sup></p> <ol style="list-style-type: none"> <li>Force or coercion <u>and</u> personal injury.</li> <li>Victim is one of the following: <ol style="list-style-type: none"> <li>under 13;</li> <li>13–15 (inclusive) <u>and</u> – household member; – related by blood or affinity to 4th degree; or</li> <li>Defendant in position of authority.</li> </ol> </li> <li>Involves the commission of any other felony.</li> <li>Sexual act aided &amp; abetted by another <u>and</u> victim is one of the following: <ol style="list-style-type: none"> <li>mentally incapable;</li> <li>mentally incapacitated;</li> <li>physically helpless; or</li> <li>forced or coerced.</li> </ol> </li> <li>Defendant armed with weapon or object.</li> <li>Personal injury <u>and</u> victim is one of the following: <ol style="list-style-type: none"> <li>mentally incapable;</li> <li>mentally incapacitated; or</li> <li>physically helpless.</li> </ol> </li> <li>Victim mentally incapable, mentally disabled, mentally incapacitated, or physically helpless <u>and</u> <ol style="list-style-type: none"> <li>Defendant related by blood or affinity to 4th degree; or</li> <li>Defendant in position of authority.</li> </ol> </li> </ol>
<p><b>Footnotes</b></p> <p><sup>1</sup> <i>People v Love</i>, 91 Mich App 495, 502 (79)</p> <p><sup>2</sup> <i>People v Snell</i>, 118 Mich App 750 (82)</p>						

<b>CSC ACT'S "MENTAL STATUS" ELEMENTS &amp; KNOWLEDGE REQUIREMENTS</b>		
<b>Element</b>	<b>Perpetrator's Knowledge Relevant</b> (Perpetrator "knows or has reason to know that the victim is . . .")	<b>Perpetrator's Knowledge Irrelevant</b> (“That other person is . . .”)
“Mentally incapable” “Mentally incapacitated” “Physically helpless”	<b>CSC I:</b> §520b(1)(d) (aid/abet); §520b(1)(g) (personal injury)  <b>CSC II:</b> §520c(1)(d) (aid/abet); §520c(1)(g) (personal injury)  <b>CSC III:</b> §520d(1)(c)  <b>CSC IV:</b> §520e(1)(c)	<b>CSC I:</b> §520b(1)(h) (blood/affinity or position of authority)  <b>CSC II:</b> §520c(1)(h) (blood/affinity or position of authority)
“Mentally disabled” <sup>1</sup> <ul style="list-style-type: none"> <li>• “mental illness”</li> <li>• “mentally retarded”</li> <li>• “developmental disability”</li> </ul>	Not applicable	<b>CSC I:</b> §520b(1)(h) (blood/affinity or position of authority)  <b>CSC II:</b> §520c(1)(h) (blood/affinity or position of authority)
<u>Footnotes</u> <sup>1</sup> MCL 750.520a(f) defines “mentally disabled” as including “mental illness,” “mentally retarded,” and “developmental disability.”		